Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1255

UNITED STATES OF AMERICA,

Petitioner,

—v.—

CHARLES J. ASH, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Page
Relevant Docket Entries	1
Opinions of the Court of Appeals (March 1, 1972) (Pet. Appendix A)	1a
Judgment of the Court of Appeals (March 1, 1972) (Pet. Appendix C)	120a
Portions of the hearing on defendants' motion to suppress evidence	9
Portions of the transcript of trial	78
Order allowing certiorari	133

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1255

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES J. ASH, JR.

PARTY NO. 1: JOHN L. BAILEY

PARTY NO. 2: CHARLES J. ASH, JR.

Charge: Ent. Bank W/Int. To Com. Rob.; Tak. Mon. Bel. To And In Cust. And Cont. Of Bank, Robbery (18 U.S.C. 2113(a), 22, D.C.C. 2901)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
April 1	No. 1 and 2: Presentment and Indictment Filed (5 Counts).
April 6	No. 2: Copy of Indictment given to Deft. Cert. filed.

DATE		PROCEEDINGS
April 15	No. 2:	Bench Warrant Ordered and Issued. Sirica, J.
April 18	No. 2:	Bench Warrant issued 4-15-66 returned executed; Deft. committed to D. C. Jail. Commitment Issued.
April 19	No. 2:	Record of Proceedings before Sam Wertleb, 4-18-66 for the purpose of Bail Only. Bail Set at $5000.00. Defendant Committed to D C Jail. Commissioner's Final Commitment filed.
April 22	Nos. 1 and 2	Arraigned, Plea Not Guilty entered;
	No. 1:	Case is referred for appointment of counsel;
	No. 2:	Defendant Remanded to the District of Columbia Jail. Attorney Irwin B. Lipman present.
		Curran, J. (Reporter—J.C. Blair) Cert. filed.
June 20	No. 2:	Order Vacating Irwin B. Lipman, and Appionting John Dwyer, 602 5th St., N.W., as counsel to defend. filed.
June 20	No. 2:	Oral Motion of Mr. Lipman to vacate his appointment due to his health granted; Case is referred for appointment of new counsel. Cert. filed. Attorney Irwin B. Lipton present. Deft. not present. McGuire, C. J. (reporter—Dawn T. Copeland).
June 24	No. 2:	Motion of Defendant for an Order remanding action for a preliminary hearing and an Order permitting inspection of the Grand Jury Minutes, filed c/s.

DATE		PROCEEDINGS
July 1	No. 2:	Motion to remand this action for preliminary hearing and to inspect the Grand Jury minutes is argued and denied as to remand for preliminary hearing and taken under advisement as to permission being allowed for the inspection of Grand Jury minutes. Defendant remanded to District of Columbia Jail. Attorney John J. Dwyer present for defendant. Bryant, J. (Rep. Elaine O. Wells) Certificate filed.
July 15	No. 2:	Letter from defendant in the nature of motion for appointment of counsel and for withdrawal of present counsel heard and denied. Defendant Remanded (Reporter: J. Blair) C/F John Dwyer, attorney for defendant present McGarraghy, J.
July 20	No. 1, 2:	Trial date changed from August 9 to August 24, 1966. Jones, J. (Reporter —S. Hatch)
July 20	No. 2:	Order granting motion to permit inspection of the Grand Jury minutes to the extent of an in camer inspection by the Court, Filed. (N) Bryant, J. (Micro 7-21-66).
August 12	No. 2:	Motion of Defendant for Mental Examination, filed. Cert. of Serv.
Aug. 18	No. 2:	Motion of Deft. for mental exam. heard and Granted. (Order to be presented) Defendant remanded to D C Jail; Attorney John Dwyer present; Bryant, J. (Reporter—P. Mallon) Cert. Filed
Oct. 24	No. 2:	Letter dated 10-21-66 from St. Elizabeths Hospital advising that Defendant is Competent for trial, filed. Copy to Atty.

DATE		PROCEEDINGS
Nov. 2	No. 2:	Case called for mental competency hearing; Order finding defendant Mentally Competent to stand trial, filed. (n) Oral motion of Reuben Bonnett for leave to withdraw as counsel granted. Referred for appointment of John A. Shorter, Jr. to defend (Order to be presented); Defendant Remanded to the District of Columbia Jail; Attorney Reuben Bonnett and John Shorter, Jr., present. Curran, C.J. (Reporter—Maloney)
Nov. 9	No. 2:	Motion of Defendant for speedy trial filed (Prepared by Defendant)
Nov. 18	No. 2:	Motion of Defendant for speedy trial, filed (Prepared by Defendant)
Nov. 30	No. 2:	Motion of Attorney for leave to withdraw as counsel, filed. C/S
Dec. 2	No. 2:	Motion of defense counsel to withdraw from case withdrawn by praecipe; motions of defendant to dismiss and for a speedy trial heard, argued and taken under advisement; Defendant remanded to D C Jail; Attorney J. Shorter present;
Dec. 5	No. 2:	Order denying motion of Defendant to dismiss and denying motion for a speedy trial without prejudice, filed (N) Matthews, J.
Jan. 6	No. 2:	Motion of Defendant for speedy trial, filed (Prepared by Defendant)
Jan. 23	No. 2:	Order dated 1-20-67 vacating appointment of John A. Shorter, Jr., as counsel to defend, filed. Curran, C.J.

DATE		PROCEEDINGS
Jan. 27	No. 2:	Motion for speedy trial, filed by defendant, Denied; Case is set for trial next week; Defendant remanded to D C Jail; Attorney Sol Rosen present.
Feb. 8	No. 2:	Motion of Defendant for dismissal of Indictment for lack of speedy trial, filed. (Prepared by Deft. (N)
Feb. 10	No. 1:	Motion of Deft. for speedy trial, filed (Prepared by Deft) (N)
Feb. 24	No. 1:	Motion for speedy trial (by deft) continued one week; Defendant Bailey not present. Co-deft. represents to the Court Deft. Bailey is in D C Jail);
	No. 2:	Motion for dismissal of indictment for lack of speedy trial heard and denied; Defendant remanded to DC Jail;
	No. 1:	Attorney Robert J. Stanford present;
	No. 2:	Attorney Sol Z. Rosen present;
Mar. 15	No. 2:	Petition of defendant for writ of Mandamus (In nature of a motion to dismiss indictment, for speedy trial, and for due process of law), filed.
Mar. 15	No. 2:	Oral motion of defendant to set definite trial date heard and denied; Attorney Sol Rosen present; Curran, C J (Reporter—B.A. Williamson)
1967		
Mar. 17	No. 1:	Motion of defendant for speedy trial heard and Denied; Defendant remanded to D C Jail; Attorney R J Stanford Present; Order denying motion, filed (N) Sirica, J (Reporter—N. Sokal) (Micro 3-21-67).

DATE		PROCEEDINGS
April 7	No. 2:	Petition for Writ of Mandamus (in nature of a motion to dismiss, for speedy trial and for due process of law (by Deft.) (Cont. three (3) weeks due to illness of Govt. Attorney). Deft. remanded to the DC Jail; Attorney Sol Rosen present. Gasch, J (Reporter—Elaine O. Wells) Cert. filed.
April 28	No. 2:	Motion for writ of mandamus Denied; Defendant remanded to D C Jail; Attorney Sol Rosen present;
July 10	No. 2:	Oral motion of defendant for continuance in order that defendant may be re-examined at St Elizabeths Hosp. for psychiatric examination and/or evaluation heard and granted, (Order to be presented); Defendant remanded to the District of Columbia Jail; Attorney Sol Rosen present. Hart, J. (Reporter—I. Watson).
Sept. 11	No. 2:	Letter from St. Elizabeths Hosp. dated 9-7-67 stating that Charles Ash is without mental disease or defect and competent for trial, filed (N)
Sept. 18		Mental competency hearing. Def. found mentally competent to stand trial. Attorney Sol Rosen present. Curran, C J (reporter J. Blair).
1968		
April 5	No. 2:	Oral motion of counsel for defendant, Sol Rosen, Esq., for leave to withdraw heard and denied. Curran, C J Reporter Jack Maher (Micro. 4-8-68). Cert. filed.

DATE		PROCEEDINGS
April 10	No. 1, 2:	Trial date continued to 5-7-68 at request of attorney for Govt. No. 1 Attorney (not present) No. 2 Attorney Sol Z. Rosen present. Waddy, J. (Reporter E. Kaufman and J. Blair).
May 8	No. 1, 2:	Case called for trial; hearing on admissibility of in-Court identification begun and concluded; trial to begin 5-9-68 Rem Robt. J. Stanford, Esq. Sol Z. Rosen, Esq. Gasch, J. Rep. D. Duschaine C/F
May 9	1, 2:	Jurors sworn on voir dire; jury and 4 alternate jurors sworn; trial begun; respited to May 10, 1968 at 11 a.m. Rem # 1 Robert J. Stanford, Esq. # 1 Sol Z. Rosen, Esq. Gasch, J. Rep. D. Duschaine C/F
May 10	1, 2:	Trial Resumed; same jury and 4 alternate jurors; respited to May 13, 1968 at 10 a.m. REM. 1. R. J. Stanford, Esq. 2. Sol Z. Rosen, Esq. Gasch, J. Rep. D. Duschaine C/F
May 13	1, 2:	Jurors report at 10 a.m.; Juror # 2 William T. Thomas, not present and is excused; Alternate juror # 1, Miss Johnnie R. Kirkland, takes seat # 2; 3 remaining jurors discharged; jury begins deliberations; Verdict: Guilty as charged as to Deft. # 2 (Ash); jury polled; Unable to agree as to deft # 1 (Bailey) jury discharged. # 2 Case referred to Probation Officer of the Court Rem Notes (3) from jury. 1: R J Stanford, Esq. 2: Sol Z. Rosen, Esq. Gasch, J. Rep. M J Maloney C/F

DATE		PROCEEDINGS
May 29	1:	Motion for Judgment of Acquittal; Order granting motion for Judgment of Acquittal. Release issued. (N) Gasch, J. (Rep. Duschaine-A.M. Taylor-P.M.
June 21	2:	Sentence: 30 months to 20 years on Counts 1 & 4; 5 years to 15 years on Counts 2, 3, & 5, said sent. by the counts to run concurrently, but consecutively with any sentence heretofore given in federal and state proceedings. Rem. Copy of Memorandum from LAA.
June 25	No. 2:	J & C Gasch, J.
July 2	2:	Mo for notice of appeal and Affidavit (2) in support thereof c/s Pro Se.
Aug. 21	2:	Order authorizing deft to appeal in f.p. . . . directing transcript be furnished at govt. expense, except voire dire and final argument; referring case to USCA for appt of counsel Gasch, J (N)
Sept. 10	2:	Copy of Appeal given to USCA & U S Atty.
Oct. 2	2:	Cert copy of order USCA 9-27-68 appointing Jerome J. Dick and extending time to file record until tr is filed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 355-66

[FILED JAN. 28, 1969, Robert M. Stearns, Clerk]

Washington, D. C.
Wednesday, May 8, 1968

UNITED STATES OF AMERICA

v.

JOHN L. BAILEY AND CHARLES J. ASH, DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

* * * *

DUANE E. DUSCHAINE
Official Reporter
United States District Court
For the District of Columbia
Washington, D. C. 20001
783-5700 Ext. 7108

* * * *

[fol. 6] DEFENDANT ASH: I filed a number of motions to ask for a speedy trial. Someone had asked for a [fol. 7] continuance. I never asked for a continuance in this matter. I had a motion for dismissal for lack of a speedy trial, and counsel would not argue. I have been called before the Court—

THE COURT: Has the motion for a speedy trial been brought to the attention of the Court?

MR. ROSEN: Five times, Your Honor, the record of the jacket will so reflect and denied, and I believe once by Judge Matthews, and one by Judge Hart and one by Judge Walsh.

DEFENDANT ASH: If Your Honor will check the records, you will see what I mean, that my motions were not argued by counsel. I just don't know. I was never brought into Court, and I don't know what ever tran-

spired. I was never brought in the courtroom during the proceedings.

* * * *

[fol. 11] THE DEPUTY CLERK: The case of the United States versus John L. Bailey and Charles J. Ash, Jr., Criminal No. 355-66; Mr. Sepenuk for the Government, Mr. Stanford and Rosen for the Defendants.

MR. STANFORD: Ready for the defense.

MR. SEPENUK: Ready for the United States, Your Honor.

MR. ROSEN: Ready, Your Honor.

THE COURT: I think in view of what counsel has previously stated, we will at this time proceed with the Stovall hearing.

Mr. Stepenuk, do you wish to call your witnesses on this point?

MR. STEPENUK: Yes, Your Honor, I do.

MR. ROSEN: Your Honor, may I have a rule on witnesses?

THE DEPUTY CLERK: Will all witnesses retire to the witness room till called. Please accompany the Marshall.

MR. STEPENUK: Do you want this witness to go back? Can he stay?

THE COURT: The first witness may remain.

[fol. 12] Whereupon,

L. PATRICK MARKOWVICH

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEPENUK:

Q State your full name and address for the record, please?

A L. Patrick Markowvich, Los Vegas.

MR. ROSEN: Keep your voice up.

Q You are an agent for the Federal Bureau of Investigations, is that correct?

A Yes, sir.

Q Would you repeat your last name?

A Markowvich.

Q Was your office formerly in Washington, D. C.

A Yes.

Q Were you in Washington, D. C., on duty on August 26, 1965?

A Yes, sir.

Q Were you assigned to investigate the robbery which [fol. 13] took place at the American Security and Trust Company, East Capitol Branch?

A Yes, I was.

Q And in the course of your duties did you ever have occasion after the robbery to interview certain witnesses?

A Yes, sir.

Q What was the purpose of these interviews?

A To attempt to effect an identification.

Q Specifically on February 3, 1966, with that in mind, did you interview Mrs. Ruby Paugh, Mrs. Jean Major, Mr. Joseph Taylor and Miss Betty Apple?

A Yes, sir, I did.

Q And would you kindly tell us what procedure you went through to obtain an identification or lack of identification at that time?

A I exhibited a group of five photographs to the persons you have named.

Q Did you do each person individually?

A Yes, sir, I did.

Q Now, continue, please.

A After observing the pictures, Mrs. Paugh, Mrs. Major, Mr. Taylor and Miss Apple selected the photo- [fol. 14] graphs of Charles Ash as being the person they had seen in the bank waving a gun. Mrs. Apple also selected a photograph of John Lee Bailey as the person she had seen running outside the bank.

Q Tell us about the five photographs—by the way, do you have the photographs present?

A No, sir, I do not.

Q Did you attempt to find them?
A Yes, sir, I did.
Q With what result?
A I was unable to locate them.
Q Now, can you tell us what those photographs looked like generally?
A They were mug shots from the Metropolitan Police Department of five negro males, generally the same age, height, and weight as Mr. Bailey and Mr. Ash.
Q And did you also have occasion to interview Miss Betty Apple on February 18, 1966?
A Yes, sir, I did.
Q And tell us where that took place?
A At the Court of General Sessions.
Q And what happened at that time?
A Miss Apple was requested to walk in the corridor [fol. 15] of the Court of General Sessions and asked if she recognized any person or persons that she had seen in the bank on August 26.
Q Then what happened?
A Miss Apple went in and pointed out an individual who was in a group of individuals and she stated the man who nodded his head, stated the man was wearing a raincoat, was now lighting a cigarette, and the same individual that she observed running outside the bank.
MR. STEPENUK: I believe that is all, Your Honor.
THE COURT: Counsel may inquire.

CROSS EXAMINATION

BY MR. ROSEN:

Q Agent Markowvich, did I understand you, you stated you showed five photos to Mrs. Paugh, Mrs. Major and Miss Apple, and Mr. Taylor, those four people?
A Yes, sir.
Q All four people were positive of the identification of Mr. Ash?
A They were not positive in the identification at that time.
Q Let's break it down to four people:
Were any of the four positive of their identification?

[fol. 16] A Mr. Taylor said that to the best of his belief, Mr. Ash was identical, but he said he could positively if he could see him in person.

Q Do your records show as to whether he ever saw him in person?

A I do not believe so.

Q Now, Miss Apple, she also said she wasn't sure it looked like him?

A Yes, sir.

Q All right. Now, did you proceed one step back, you say you had five photographs, is that right?

A Yes, sir.

Q Do your records or notes reflect the names of these five, the other three people?

A Yes, sir, they do.

Q What are their names?

A Clifton Gregory, Robert Lee Willis, Theodore Clemens.

Q Now, let me ask you, you are going—going back to the day of the event, you were in your office at the time of the robbery in Washington, D. C.?

A I was in Washington, D. C.

Q I take it you were assigned to investigate this robbery, is that correct?

[fol. 17] A Yes, sir.

Q All right. Did you work alone when you investigated the robbery?

A There were a number of agents at the bank after the robbery.

Q All right. I take it at the time you spoke to various witnesses as to the description of the people who alleged robbed this bank, is that correct?

A Yes, sir.

Q All right. Now, based on this description you got, did you at any time before this date in question, I believe you said it was February 3rd, 1966, did you at any time, these four people you named, Mrs. Paugh, Mrs. Major, Mr. Taylor, and Miss Apple, ever witness any photographs of either Mr. Ash prior to the showing of these photographs?

A No, sir, not to my knowledge.

Q Did you attempt to find them?
A Yes, sir, I did.
Q With what result?
A I was unable to locate them.
Q Now, can you tell us what those photographs looked like generally?
A They were mug shots from the Metropolitan Police Department of five negro males, generally the same age, height, and weight as Mr. Bailey and Mr. Ash.
Q And did you also have occasion to interview Miss Betty Apple on February 18, 1966?
A Yes, sir, I did.
Q And tell us where that took place?
A At the Court of General Sessions.
Q And what happened at that time?
A Miss Apple was requested to walk in the corridor [fol. 15] of the Court of General Sessions and asked if she recognized any person or persons that she had seen in the bank on August 26.
Q Then what happened?
A Miss Apple went in and pointed out an individual who was in a group of individuals and she stated the man who nodded his head, stated the man was wearing a raincoat, was now lighting a cigarette, and the same individual that she observed running outside the bank.
MR. STEPENUK: I believe that is all, Your Honor.
THE COURT: Counsel may inquire.

CROSS EXAMINATION

BY MR. ROSEN:

Q Agent Markowvich, did I understand you, you stated you showed five photos to Mrs. Paugh, Mrs. Major and Miss Apple, and Mr. Taylor, those four people?
A Yes, sir.
Q All four people were positive of the identification of Mr. Ash?
A They were not positive in the identification at that time.
Q Let's break it down to four people:
Were any of the four positive of their identification?

[fol. 16] A Mr. Taylor said that to the best of his belief, Mr. Ash was identical, but he said he could positively if he could see him in person.

Q Do your records show as to whether he ever saw him in person?

A I do not believe so.

Q Now, Miss Apple, she also said she wasn't sure it looked like him?

A Yes, sir.

Q All right. Now, did you proceed one step back, you say you had five photographs, is that right?

A Yes, sir.

Q Do your records or notes reflect the names of these five, the other three people?

A Yes, sir, they do.

Q What are their names?

A Clifton Gregory, Robert Lee Willis, Theodore Clemens.

Q Now, let me ask you, you are going—going back to the day of the event, you were in your office at the time of the robbery in Washington, D. C.?

A I was in Washington, D. C.

Q I take it you were assigned to investigate this robbery, is that correct?

[fol. 17] A Yes, sir.

Q All right. Did you work alone when you investigated the robbery?

A There were a number of agents at the bank after the robbery.

Q All right. I take it at the time you spoke to various witnesses as to the description of the people who alleged robbed this bank, is that correct?

A Yes, sir.

Q All right. Now, based on this description you got, did you at any time before this date in question, I believe you said it was February 3rd, 1966, did you at any time, these four people you named, Mrs. Paugh, Mrs. Major, Mr. Taylor, and Miss Apple, ever witness any photographs of either Mr. Ash prior to the showing of these photographs?

A No, sir, not to my knowledge.

Q They were never called down to headquarters and shown a row of five photographs or at FBI headquarters to identify any possible male subjects fitting the description.

A Not to my knowledge. I am not certain about this. I cannot state, I went to the robbery squad or not.

Q Can you tell us with certainty as to whether on the [fol. 18] 3rd, either of these people you mention had ever seen any photographs of Mr. Ash?

A To my knowledge, they had not.

Q All right. Now, am I also safe in saying that primarily you included the picture of Mr. Ash in the group because of the testimony given by Clarence McFarland, is that so?

A Yes, sir.

Q Now, can you tell us, approximately, you cannot locate the pictures of Mr. Gregory, Mr. Willis or Mr. Theodore Clemens?

A No, sir.

Q Were these all color slides or color photographs?

A No, sir, they were black and white.

Q You made no attempt or effort at the time to keep in your record or make any notes of them?

A I had them. I don't know what happened to them after I left.

Q Can you tell me, approximately, were the mug shots of the face or the whole body?

A Mug shots of the face.

Q In other words, to the people, if you presented or showed them a mug shot, let's say, of Mr. Willis, just by knowing—seeing his face, they would not know anything about how tall he was, is that so?

[fol. 19] A That is correct.

MR. ROSEN: May I have the Court's indulgence just one moment, Your Honor?

THE COURT: Yes, sir.

MR. ROSEN: Your Honor, for the purpose of the record, there was a recent case of the Court of Appeals, but I cannot recall the name, it was addicted to the effect that it called upon police, that it be made a part of the record in any example, the question of a motion to suppress.

I have subpoenaed, Your Honor, the Communications Division of the transcript of the dictaphone as far as this robbery, and I would ask that it be marked at this time.

THE COURT: All right.

MR. ROSEN: And be made a part of the record.

THE COURT: All right.

THE DEPUTY CLERK: Defendant Ash's Exhibit 1 marked for identification.

(Defendant's Ash's Exhibit No. 1 was marked for identification.)

MR. ROSEN: Your Honor, I have given a copy to Mr. Sullivan. I don't know if Mr. Sepenuk has seen it.

MR. SEPENUK: No, I haven't.

[fol. 20] THE COURT: All right, sir, show it to him. While counsel is reading it, I will invite the Jury in in the previous case and dispose of that matter.

Counsel come to the Bench, please.

MR. ROSEN: Which case?

THE COURT: The previous case.

(Short recess.)

THE COURT: Have you had an opportunity of reading the communication?

MR. SEPENUK: Yes, Your Honor.

THE COURT: All right.

MR. SEPENUK: I might say I had a chance to read that, and I am in doubt for the purpose of that document.

THE COURT: I think I understand.

MR. ROSEN: My problem is mainly this, Your Honor, the reason I wanted this, I believe the officer testified three of the people were shown mug shots.

THE COURT: Yes.

MR. ROSEN: The identifications on the police call goes mainly to height and weight, and that there was a lookout, for example, No. 1 negro male, 19, six foot, 165, thin build, and then it goes on and says the identi-

[fol. 21] fication given at the time was mainly by height and weight and appearance rather than a facial description.

THE COURT: I understand.

MR. ROSEN: I think it is quite relevant that these people were not asked to identify the other three photographs, Mr. Gregory, Mr. Willis or Mr. Clemens, and if these were all mug shots, these people might not have any idea whether or not they also had the same build or appearance as Mr. Ash or Bailey. It is conceivable either one of them, although I think if I am not mistaken, I think the Court could strike Mr. Gregory at this time.

THE COURT: I tried Mr. Gregory for first degree murder.

MR. ROSEN: That is what I was going to say, I don't know what type of—

THE COURT: It is a pretty good likeness to Mr. Gregory. He is tall and fair, and I would say it would reasonably fit the description. Whether his face is comparable to the face of those accused in this case, I would have a question about it. I don't remember his face.

MR. ROSEN: I simply call it to the Court's attention. I don't know anything about this Theodore Clemens [fol. 22] or Mr. Willis, but it is highly conceivable or highly possible it might not fit the general description as to height, weight, and appearance as to Mr. Ash.

I think that the Court is making this determination, particularly under Simmons and Stovall as to whether the photographs themselves were suggestive in a sense was this really a cross section.

As I read Simmons, which really is—Simmons relies on Stovall, and I think it is appropriate language, Your Honor. I think, for example, I call to the Court's attention the language of Mr. Justice Harlan on page 4 of the slip opinion, he goes on, "Even if the police subsequently follow the correct photograph identification and proceed to show him the pictures of a number of individuals without indicating whom they did suspect, there is some danger the witness may make an incorrect identification. This danger increases as the police display to the witness only the picture of a single individual who generally resembles the person they saw, and if they show them several persons among which a photograph

of a single such individual recurs or in some way emphasized. Chances of this identification is also heightened when the police indicate to the witness they have other evidence that one of the persons pictured committed the crime.

[fol. 23] It goes on to illustrate various ways as to how to show pictures, and the pictures can be suggestive of the people arrested.

Now, one of my proffers is basically that in light of that fact that as I read this record of the broadcast, that the main thing that was stressed in the mind of the victim, the complainant, was the build and on the appearance. I show this to the Court, which is clearly—this was the information given to the police, the height, the slender build of the people who robbed them rather than the face and facial features.

It would seem to me, the crux of my proffer, Your Honor, I don't think that merely showing the mug shots of five people would necessarily show a cross section such that the people could have a chance to identify the persons involved in this crime.

THE COURT: Well, the three criteria mentioned by Mr. Justice Harlan in the excerpt you read to the Court, the three criteria are as follows:

Single picture? No, he showed five pictures.

Was the picture in some way emphasized by recurring, that is to say, were the two pictures of the same man, and the answer to that is "no".

[fol. 24] The third criteria mentioned by the Justice is whether or not the FBI or law enforcement officials told any of the witnesses—

MR. ROSEN: That they have other evidence.

THE COURT: —that they had other evidence.

As I understood the witness's response to that, he did not make such a statement. Perhaps I am incorrect.

MR. ROSEN: Let me ask him.

BY MR. ROSEN:

Q Let me ask you, where did these people see these photographs?

A The two bank ladies were exhibited the photographs separately at the bank in a little room to the rear of the bank.

Q That was Mrs. Paugh and Mrs. Major?

A Mrs. Paugh and Mrs. Major.

Q Let me ask you this: At that time, did you in any way indicate to them or tell them the purpose of viewing the photographs?

A As I recall, I probably told them to look at the photographs and see if they recognized anyone in these photographs.

Q Well, did you tell them that it was specifically to identify someone in this particular robbery?

[fol. 25] A In the robbery of the bank, yes, sir.

Q I see. All right. Did you mention anything else about the crime to them?

A No, sir.

Did you at all tell them their names of the people involved?

A No, sir.

Q Did you tell them the general description or height, weight, appearance, was a slender build or stocky, or anything like that?

A No, sir.

Q All right. Where did you show Mr. Taylor or Miss Apple?

A Yes, sir.

Q Mrs. Apple, where did you show those photographs?

A Miss Apple at the time was employed at the Savarin Restaurant at the Union Station.

Q All right. What about Mr. Taylor?

A Mr. Taylor was at his residence.

Q All right. Now, did there ever come—now, to your own personal knowledge—let me rephrase the question.

Do you have any personal knowledge whether Mr. Gregory, or Mr. Willis or Mr. Clemens fitted the general description of Mr. Ash?

[fol. 26] A As I recall, they generally do, yes, sir.

Q Do you know any reason why, for example, these people weren't called down, either down to police headquarters or to the FBI to identify a greater number of photographs?

A No, sir, I do not.
Q I see.
MR. ROSEN: I have no further questions.
THE COURT: Did you tell any of these witnesses that you had any information from Clarence McFarland or anybody else as to the involvement of these people?
THE WITNESS: No, Your Honor.
THE COURT: You did not, all right.

CROSS EXAMINATION

BY MR. STANFORD:

Q Agent Markowvich, what date did you show these photos to these people?
A That was February 3rd, 1966.
Q Approximately five months—1966?
A Yes, sir.
Q Five months after the occurrence of August 26?
A Yes, sir.
Q The Court has indicated to us that Gregory is a [fol. 27] person convicted in the District of Columbia. Do you know whether Willis and Clemens were also persons who are convicted in the District of Columbia?
A That I could not state.
Q Do you know whether those photographs were FBI photographs or whether they were Metropolitan Police photographs?
A Metropolitan Police Department.
MR. STANFORD: Your Honor, Agent Markowvich's description is his opinion, and his opinion might be good, but I think the Court should consider whether or not these photographs are similar or dissimilar. I think they are something which are a part and are available.
THE COURT: Now, did we get the correct name, the names I got—
MR. STANFORD: Clifton Gregory.
THE COURT: Robert Lee Willis, Theodore Clemens?
THE WITNESS: Yes, Your Honor.
THE COURT: And these two defendants?
THE WITNESS: Yes, sir. I have the Metropolitan Police Department number.

MR. STEPENUK: I might say, Your Honor, excuse me for interrupting, but I have already tried the Metro-[fol. 28] politan Police Department to Sergeant Whelan Fallin, I believe it is. I asked him to get these photographs, and he said they did not have them. He looked for them this morning and they are not in the file, and according to Sergeant Fallin, they are not available. I would be happy to have him check again. After this matter came up this morning, Your Honor, I did try to get that information. These photographs are not there, according to Sergeant Fallin.

MR. STANFORD: May I address Mr. Stepenuk, Your Honor?

I wanted to ask him whether he knew whether these people have been convicted or arrested in any other jurisdiction.

MR. STEPENUK: I do not know.

MR. STANFORD: It is a possibility that those photographs may be available in Maryland or Virginia or some other jurisdiction.

THE COURT: Possibly. I think Gregory is incarcerated for some time. He was first tried by Judge Holtzoff, and the case was reversed, and then he was tried by Judge McGarraghy and the case resulted in a mistrial, and then he was tried in this Court the third time, and it is now on appeal.

I don't recall offhand the date of the offense, but it was a considerable time ago. I think he has been incarcerated since he was apprehended.

[fol. 29] I am going to ask my law clerk to see what he can do about making these pictures available to counsel.

Do you have the names? The first name is Clifton Gregory, the next one is Robert Lee Willis, the third name is Theodore Clemens, and these two defendants are John L. Bailey and Charles J. Ash, Jr.

Now, Mr. Markowvich has the numbers which may be of some assistance. I ask you to give him those numbers.

MR. ROSEN: Your Honor, on this point, I should have asked, and I mentioned it to Mr. Stanford, and

possibly the Court would entertain the dates of the various photographs. In other words, was it a recent photograph or Ash or Bailey or any of these other people that were shown to these witnesses.

THE COURT: I think the photograph usually indicates the date on which it was taken.

MR. ROSEN: That is correct.

MR. STANFORD: May I ask if Agent Markowvich knows or the U. S. Attorney whether there was some indication in the other record, another police record, of the facts of the taking of the photographs?

MR. STEPENUK: I do not know.

MR. STANFORD: If it is not on the photograph itself it might be some other—on some other record?

[fol. 30] THE WITNESS: I believe, as Your Honor has stated, all of the photographs at the Metropolitan Police Department have the date the photograph was taken.

THE COURT: What may well have happened is that since we have been using photographs rather more widely than formerly for this means of identification, photographs may have been taken out to some other case and misplaced. That sometimes happens.

MR. ROSEN: Although I would say this, Your Honor, Simmons, as the Court notes, has been a recent phenomena, and Wade and Stovall came down last May or last June, so I don't know.

THE COURT: Identification by photographs is nothing new.

MR. ROSEN: No. My point is this, I don't think there is much stress on the in-court hearing to suppress photographs.

THE COURT: If we can locate the photographs, they will be located.

MR. STANFORD: Your Honor, if I may, I have just two or three more questions that I may ask Agent Markowvich.

[fol. 31] BY MR. STANFORD:

Q When you asked these people these questions, were they together themselves or did you ask the question when showing the photographs to them separately?

A They observed the photographs separately.
Q Were you by yourself at the time?
A No, sir, I had another agent with me.
Q And on each occasion, was it the same agent?
A Yes, sir.
Q And who was that?
A Bernard E. Buscher.
Q Buscher?
A Yes, sir.
Q Is he the agent here today?
A No, sir.
Q Is he assigned to the Washington area?
A Yes, sir.
Q Now, you said there were five photographs altogether, one of Charles Ash and one of John Bailey?
A Yes, sir.
Q At that time, do you know whether the other three met either or both of the descriptions which were given [fol. 82] on the police lookout following the robbery in August, 1965?

Did the other three meet the description of negro males, 19 years, 6 feet, 125 pounds, thin build, or the description, negro male, 35 to 45, 6 feet, 155 to 160 pounds, medium brown skin, sharp features, big nose and sharp chin? Do you know whether of those three whether the description met?

MR. STEPENUK: Your Honor, may I just interpose it? I believe a more pertinent question would be whether or not those pictures in fact resembled Messrs. Bailey and Ash without getting into a lot of hearsay, and garbled information in your memorandum.

THE COURT: I think that is probably correct.

You can rephrase your question if you wish.

MR. STANFORD: All right, let me rephrase that, Your Honor.

BY MR. STANFORD:

Q Do you know whether of the three, any of the three were 35 to 45 years of age other than John Bailey?
A I can't recall at this time. I believe they were, but I cannot say positively.

Q Do you know whether any of the three were 19, around 19 years of age?

[fol. 33] A Again, I can't recall positively.

MR. STANFORD: Your Honor, just for the purpose of keeping the record clear, I ask that Mr. Rosen has suggested that be marked for identification.

MR. ROSEN: This is also the P.D. 251.

THE COURT: All right.

MR. ROSEN: For Ash and Bailey, Defendant's Exhibit for identification. This is called the offense report.

THE COURT: Have you seen that?

MR. STEPENUK: No, Your Honor.

MR. STANFORD: This is actually page 2 of that that we are making reference to of the entire three page document.

MR. STEPENUK: Yes. Again, Your Honor, I don't really see the purpose of this, and we have a report based essentially upon hearsay evidence. As I understood, the issue in this proceeding is whether or not there was any unfairness on the part of the Government Agent in exhibiting photographs to certain Government witnesses, whether there was any over-reaching, whether there was any unnecessary suggestion, things of that nature. I really—unless I am missing the point, I don't understand the relevance for what you are doing here.

MR. STANFORD: If Agent Markowvich, Your [fol. 34] Honor, is aware of the description which the people have given of the two men who were at the bank, and then he or someone else inadvertently or otherwise picked two—three photographs which were obviously fat faced people, fifty or fifteen.

THE COURT: Yes, I think that is the answer.

THE DEPUTY CLERK: Joint Defendant's Exhibit No. 1 marked for identification.

(Joint Defendant's Exhibit No. 1 was marked for identification.)

MR. STEPENUK: Your Honor, may I just sit while I am addressing the Court?

Agent Markowvich actually had pictures of Messrs. Ash and Bailey, and he knew what they looked like, so

the question, did he take three other photos knowing what they looked like, and having actual pictures in his hand, did he take three other photos in an effort of perhaps misleading the witnesses. Agent Markowvich didn't need any description of these gentlemen, he had their pictures.

MR. ROSEN: That is the issue before the Court.

MR. STANFORD: That is a leading question in photographic form.

THE COURT: I will let you continue. Let's come to the point.

[fol. 35] MR. STANFORD: I will try to make it very quickly, Your Honor.

BY MR. STANFORD:

Q Now, with respect to the description given by, was it, Miss Apple of pointing out by Miss Apple of John Bailey at the General Sessions Court, this occurred on what date?

A That was February 18, 1966.

Q It was recently, subsequent to the date of February 3, when she had seen the photographs of John Bailey?

A Yes, sir.

Q Did she again see that photograph on the day that you went to Court?

A No, sir.

Q She did not see the photograph between February 3, when she did make an identification and the day that she supposedly identified Bailey in General Sessions Court?

A Not to my knowledge.

Q How close were you to John Bailey at the time, or how close was she at the time that she saw Bailey?

A As I recall, she walked around in the corridor and there was, I believe, a minimum of fifty persons there and she walked closely to him, came back to where I was standing.

[fol. 36] Q What did you say prior to the time?

A I asked if she would walk through the corridor and see if she recognized any person or persons that she had seen in the bank, running through the bank.

Q Did you point in any direction?

A No, sir.

Q How close were you to Bailey at the time that you requested her, I presume, who was standing beside you, how close were you to Bailey at the time you first said, do you recognize anybody in this corridor?

A Oh, I recall maybe thirty, forty feet.

Q And Mr. Rosen had asked you as to the positiveness of the identification by Mrs. Paugh and Mrs. Major and Mr. Taylor. What—how would you rate the identification by Mrs. Apple of the photograph that she was shown of a photograph of that day? Was it a vague identification? Was it, say, I think it looks like him, one of the men?

A She said they could be the two men she had seen there.

Q What was her statement in Court with regard to that after seeing the man Bailey in Court, what was her statement? Was it altered in any way, or did she still say—

A No. At that time she stated she was positive in her identification.

[fol. 37] Q Did she say it looked like the photograph?

A I don't recall.

Q Did she mention the photograph at all?

A Not to my recollection.

Q Did she ask to see the photograph again?

A No, sir, not as I recall.

MR. STANFORD: I don't believe I have anything more at this time.

MR. ROSEN: I have nothing further.

THE COURT: I have one or two questions.

At the time Miss Apple identified Defendant Bailey at the Court of General Sessions on the 18th of February, 1966, and he was standing approximately thirty or forty feet from you, in what status was he at that time?

THE WITNESS: He was talking to a group of people.

THE COURT: Was he handcuffed?

THE WITNESS: No, sir.

THE COURT: Was there anything indicating he wa in custody?

THE WITNESS: No, Your Honor.

THE COURT: Do you know who the other peopl were that he was talking to?

[fol. 38] THE WITNESS: No, Your Honor, I don't

THE COURT: Were these policemen or the jailer o anybody that you recognized in that category?

THE WITNESS: Not to my knowledge.

THE COURT: I see.

MR. STANFORD: If I may, I have an additiona question after conferring with Mr. Bailey.

THE COURT: Surely.

BY MR. STANFORD:

Q Was there any other FBI Agent or police officer whom you now or at the time or have learned subsequently was working on this case in the corridor?

A Yes, sir.

Q Who was that officer?

A Sergeant Fallin and Sergeant Lynn.

Q Sergeant Lynn?

A Sergeant Lynn.

Q Were there anywhere near Bailey at the time?

A No, sir.

Q Do you know whether they had conferred with Miss Apple prior to going over to the courthouse?

A Yes, sir.

[fol. 39] Q Did you ride over together in the car?

A I cannot recall who took Miss Apple over.

Q Do you know if they had any conversation with her preparatory to this viewing which was out of your hearing?

A They could have. I do not know, sir.

MR. STANFORD: I have nothing further.

THE COURT: All right. Anything else, gentlemen?

MR. ROSEN: Would you indulge us a moment?

THE COURT: Surely.

MR. STANFORD: Your Honor, this may be repetitious, but I don't believe so.

BY MR. STANFORD:

Q Agent Markowvich, what was Miss Apple told as to the purpose of her coming down to General Sessions Court?

A To see if she could recognize any person or persons that she had seen running from the bank on, I believe it was, August 26.

MR. STANFORD: I see.

THE COURT: Anything else, gentlemen?

MR. SEPENUK: No, Your Honor.

MR. ROSEN: Not at this time.

MR. STANFORD: None.

[fol. 40] THE COURT: You may be excused, sir. We will need you later. Don't leave us.

THE WITNESS: Yes, sir.

THE COURT: Anything else, gentlemen?

MR. SEPENUK: Your Honor, I should mention that I believe this does satisfy Your Honor's suggestion earlier about an out-of-court identification prior to the testimony on an in-court identification. During the last day or so, these witnesses have been reinterviewed and have been shown photographs, five photographs, not five different photographs, the ones they have previously heard testimony on with similar results. I believe in every case, I don't think under Your Honor's suggestion that testimony would be necessary, but we will be perfectly happy to put it on. I think there has been adequate out-of-court identification prior to in-court testimony, but if Your Honor feels you want additional testimony on this point, we will be happy to put Agent Hugh Berry on from the Federal Bureau of Investigations who will testify to the results of what these witnesses said with respect to five more photographs, as recently as yesterday and today.

THE COURT: I think we will receive that testimony and also had you planned to put on the two Metropolitan Police, Sergeant Fallin and Lynn?

[fol. 41] MR. SEPENUK: No, Your Honor. Sergeant Lynn's wife was hurt in an automobile accident yesterday. I haven't seen him. Maybe he will come here.

THE COURT: Maybe Sergeant Fallin would be able to state whether they made any suggestion to the wit-

nesses. Agent Markowvich did not know what the purported conversation was. I think if he is available, we should ask him the question so it will be in the record. I will be glad to send for him if he—if he isn't here in connection with this case.

MR. SEPENUK: He is not here. I will be happy to get him over here.

THE COURT: Mr. Clerk, do you have any information about these photographs from Police Headquarters?

THE CLERK: Your Honor, I spoke with a man in the identification bureau, and he indicated to me he hadn't checked yet, but he saw no reason why they shouldn't have the photographs on file. He intended to get those photographs and send them by a motor man.

MR. SEPENUK: I might say, Your Honor, Sergeant Fallin is now with the Capitol Police. He may very well still have this file. He brought it over earlier today, and if it wouldn't be to much of an imposition—

[fol. 42] THE COURT: What is Sergeant Fallin's first name?

MR. SEPENUK: Whelan, I believe.

THE COURT: Whelan?

MR. SEPENUK: Whelan, W-H-E-L-A-N Fallin.

THE COURT: He is with the Capitol Police?

MR. SEPENUK: Yes, sir.

THE COURT: Mr. Clerk, would you call the Capitol Police and see if you can get Sergeant Fallin with the file.

Suppose you put on the other Agent?

MR. SEPENUK: Yes, Agent Berry.

Whereupon,

HIGH GORDON BERRY

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q State your name?

A Hugh Gordon Berry.

Q And you are an agent for the Federal Bureau of Investigation?

A That is correct.

Q Your office is here in Washington?

[fol. 43] A That is correct.

Q On May 7th, 1968, did you accompany me to the American Securities & Trust Company at the East Capitol Street Branch for the purpose of interviewing certain witnesses?

A Yes, sir, I did.

Q And did we interyiew certain witnesses at that bank, specifically Mrs. Jean Major and Mrs. Ruby Paugh?

A That is correct.

Q And were certain photographs shown to these two ladies?

A That is correct.

Q I would like you to look at these photographs, and I suppose I should have them marked.

MR. ROSEN: I would suggest that, Your Honor.

THE COURT: Yes, they may be marked.

MR. SEPENUK: Would you like to see them first—By the way, there are two photographs here are the same actually—I see they are different.

THE DEPUTY CLERK: Government's Exhibit No. 1 through 5 marked for identification.

(Government's Exhibits Nos. 1 through 5 were marked for identification.)

[fol. 44] BY MR. SEPENUK:

Q Would you examine those photographs, please, Agent Berry?

A I have.

Q And were those the photographs that were shown to these ladies, Mrs. Paugh and Mrs. Major?

A Yes, sir, they were.

Q And did you inform those ladies of the purpose of their viewing these photographs?

A They were asked whether they could identify anyone.

Q Now, with what results—first as to Mrs. Paugh, by the way, was she interviewed in the presence of Mrs. Major or out of the presence of Mrs. Major?

A They were interviewed independently.
Q Mrs. Paugh, what did she say?
A Mrs. Paugh selected a picture of Charles Ash.
Q Does that picture have a number on it?
A Yes, sir, it does.
Q What is it?
A Government's Exhibit No. 5.
Q Did you make any comments or suggestions to Mrs. Paugh concerning Mr. Ash?
[fol. 45] A I did not.
Q At that time?
A I did not.
Q Did you state anything to Mrs. Paugh concerning the nature of any evidence the Government might or might not have against Mr. Ash?
A No, I did not.
Q Would you tell us what happened in the case of Mrs. Major?
A Mrs. Major also selected a picture of Charles Ash.
Q Government's Exhibit No. 5?
A Government's Exhibit No. 5.
Q Did you make any suggestion to Mrs. Major concerning that picture of Mr. Ash?
A No, I did not.
Q Did you tell her about any evidence the Government might or might not have against Mr. Ash?
A I did not.
Q Now, did you also in my presence interview Miss Betty Apple?
A Yes, I did.
Q Was that yesterday?
[fol. 46] A That was yesterday.
Q Did that interview take place at the Savarin Restaurant in Union Station?
A That is correct.
Q Did you exhibit those photographs to Miss Apple?
A Yes, I did.
Q With what result?
A She also selected a picture of Charles Ash.
Q Anything else?

A Yes, she—after seeing them, she then looked over the others and started to pick up one of the other pictures, and she started to say, I think—she says, "No, I do not know."

Q That other picture that you just testified to, does that have an Exhibit No. on the back of it?

A Yes, it does.

Q What is the number?

A That is Government's Exhibit No. 1.

Q Did you make any suggestion to Miss Apple concerning Mr. Ash?

A I did not.

Q Did you make any effect to single him out?

A No, sir.

[fol. 47] Q Did you state anything about the evidence the Government might have against Mr. Ash?

A No.

Q Early this afternoon at my request, Agent Berry, did you also show those photographs to Mr. Joseph Taylor?

A Yes, sir.

Q And was that here in the Courthouse?

A Yes, it was.

Q And what did Joseph Taylor say?

A "I am sorry, I am not certain. I was distracted at the time it was in your presence. I am very sorry, I am not certain."

Q Right. I believe that is all of this witness. Let me just check one thing here.

Well, did you make any suggestions to Mr. Taylor about Mr. Ash or Mr. Bailey?

A No, I did not.

Q Did you state the nature of the Government's evidence against those gentlemen?

A No, I did not.

Q Did you make any effort to single them out?

A I did not.

[fol. 48] MR. SEPENUK: I believe that is all.

THE COURT: All right, sir.

MR. SEPENUK: I might say—excuse me for interrupting, but I would be happy to take the witness stand.

I do remember, I was there. I would be happy to take the witness stand and give my testimony on that subject if you feel it is necessary. I can state it now or I can state it under oath.

THE COURT: Well, suppose we see what else you have.

MR. SEPENUK: Right.

MR. ROSEN: May I see the pictures?

CROSS EXAMINATION

BY MR. ROSEN:

Q Was that Agent Berry, is that correct?

A That is correct.

Q May I see these photos?

A Here you are.

Q Agent Berry, let me ask you this: What was the purpose of showing these photographs to these witnesses yesterday?

A I was accompanying Mr. Sepenuk and he wished to have the witnesses view the photographs.

Q All right. Now, when you went to say—you identified yourself as an FBI Agent, is that so?

[fol. 49] A That is correct.

Q Mr. Sepenuk identified himself as an Assistant United States Attorney?

A That is correct.

Q At the same time you told them that they would be asked to identify people involved in this particular bank robbery, isn't that so?

A No, I don't believe they were told—

Q Didn't you tell them or ask if they could recognize any one of these particular photographs?

A That is correct.

Q Did you mention the fact of the robbery at all that they were witnesses to?

A Yes.

Q In other words, they had in their minds the purpose of viewing these photographs, is that so?

A That is correct.

Q All right. Now, I notice two of the pictures you have police numbers, is that correct, that is Government's Exhibit No. 4 which I believe is Mr. Bailey and Government's Exhibit 5 which is Mr. Ash.

A I would have to examine all of them.

[fol. 50] That is correct.

Q All right. Also on those photographs of Mr. Ash and Mr. Bailey, they are standing, and they are much more vertical photographs than the other three, is that so, they have a height marker or some sort of pole near them?

A That is correct.

Q Now, is there any reason for that to show them the height?

A I am sorry, I don't understand your question.

Q In other words, is there any reason why the photographs of Mr. Ash and Mr. Bailey are much more vertical than the others? You see the whole body of Mr. Ash and the whole body of Mr. Bailey, whereas the other three sets of photographs show only the mug shot or just up to the chest?

A Yes, the reason for that, these were the only colored photographs I had on me at the time. I was not aware we would be doing this when—I was not aware we would need photographs when I went to see Mr. Sepenuk. At the time I happened to have these photographs with me. These were the only colored photographs we had, sir, so you try to be—give them the complete similarity. We selected the colored photographs to show them.

Q Let me ask you this: Were you with Agent Mar-

[fol. 51] kovich on the 18th when he showed the photographs?

A 1965?

Q In 1966.

A No, I was not.

Q Let me ask you this: Were any of these witnesses positive of the identification of Mr. Ash?

A Absolutely positive, no.

Q Now?

A Absolutely positive, no.

Q They were not?

A No.
Q What was the remark of Mrs. Paugh?
THE COURT: How do you spell that?
MR. ROSEN: P-U-G-H.
MR. SEPENUK: Actually, it is P-A-U-G-H.
THE COURT: That would be Paugh.
MR. ROSEN: Mrs. Paugh.
THE WITNESS: She said she thinks this was him.

BY MR. ROSEN:

Q She wasn't certain?
A No, sir.
Q What about Mrs. Major?
[fol. 52] A The same thing.
Q All right. What about Mr. Taylor?
A Mr. Taylor, I do not recall that.
Q What about Mrs. Apple?
A Mrs. Apple also said she believed that was the man.
Q She wasn't sure?
A That is correct.
Q All right. Let me ask you this: At any time, did you and Mr. Sepenuk make any attempt to have the people come down to police headquarters or FBI headquarters were they could look possibly at a whole reel of these photographs and possibly try to pick out the people with a larger selection?
A You mean yesterday or today?
Q Yesterday or at any time before trial?
A As far as—I never did; I don't believe Mr. Sepenuk did.
Q I am asking you, why didn't you?
In other words, I think you are familiar with the identification process of the FBI headquarters?
A Yes.
Q I take it you are familiar with the identification of the Metropolitan Police Department headquarters?
[fol. 53] A That is correct.
Q In other words, did they have either reels or, as I understand it, either reels of photographs that go into a slide projector or shown on the wall or there is a whole selection or whole book of mug shots? I am speaking

first of Mr. Ash and ask the person of one or two of a greater cross section that five?

All right, why wasn't that procedure followed in this case?

A I can only say from my own experience. I have only been assigned to—less than a year.

Q Surely you had ample opportunity to?

A Of course, they were indicted in 1966 and were awaiting trial, and they had been identified.

Q Well, that is true, but the point is, they never seen a greater cross section other than a few photographs, isn't that so?

A That is right.

Q And did you ever at any time ever indicate the name of these people? In other words, when showing these photographs did you ever tell, for example, Mrs. Paugh that the man she picked out was Charles Ash, Jr.?

[fol. 54] A No, I did not.

Q You did not?

A I did not.

Q Did you ever give—did you ever tell Mrs. Major or Mr. Taylor or Mrs. Apple the name of the man they picked out?

A No.

Q Can you tell us the dates these photographs were made?

A Well, the date on this one is Charles Ash, is dated 8/21/65, the one of John Lee Bailey is dated 3/25/62, and these other three, I do not—they do not give when they happened to be made in the past four months.

Q In the past four months.

MR. ROSEN: I have nothing further.

THE WITNESS: There is a date on one, I am sorry, January, 1968, is the date on the film. That is not necessarily the date of the picture.

MR. ROSEN: I have nothing further of this witness.

THE COURT: All right, sir.

CROSS EXAMINATION

BY MR. STANFORD:

Q Agent Berry, I believe you said that Mrs. Betty Apple identified the photograph of Charles Ash?
[fol. 55] A That is correct.

Q And thereafter she said—she picked up Exhibit No. 1, is that correct, and she said, "I think," and then put it down?

A That is right, she started to pick it up. I do believe she fully picked it up and she said, "I believe this is the one." She started to pick up the other one and she said, "No, I am not certain."

Q That is all she said about the five photographs?

A That is correct.

Q So that Exhibit No. 4 which you identified to be John Bailey was not picked up by Mrs. Apple?

A That is correct.

Q In other words, she made no identification of John Bailey of that photograph at the time?

A That is correct.

MR. STANFORD: I have nothing further.

MR. SEPENUK: Just one question.

REDIRECT EXAMINATION

BY MR. SEPENUK:

Q Is it your testimony no effort was made by either you or by myself to tell these witnesses whether or not they made a correct or incorrect identification?
[fol. 56] A That is correct.

THE COURT: Anything else?

MR. ROSEN: Not of this witness.

THE COURT: Thank you, sir, you may step down. May I see those photographs?

MR. ROSEN: Your Honor, just as another note, as I mentioned to Mr. Stanford, I am not so sure in line with the recent showing of photographs that we don't have a Wade problem right now. We are certainly in post-indictment stage, and it is clear after Wade as to

these—the showing of the photographs yesterday by Agent Berry and Mr. Sepenuk. As far as I am concerned, this would be tantamount to a line up.

MR. STANFORD: Your Honor, we don't contend the photographs of these people was—needed representation, but at that stage of the proceeding if there is going to be any suggestion which there certainly would be, or at least that some of these men, two of them were the persons involved. It is a presentation which should be conducted with counsel present, whether the defendants are present or not is unimportant, it is the same as if it were a lineup.

THE COURT: I am not so sure it is. It seems to me that the question is what, if any, limitation the Court [fol. 57] would put on the Government in precluding the Government from bringing in certain evidence. I think I can deal with this problem by simply precluding the Government from bringing evidence in that the witnesses made of this identification yesterday.

Now, we had a somewhat similar problem in a case I tried last week involving a robbery of the National Bank of Washington. I think I mentioned it to you gentlemen in Chambers. There, in order to qualify a witness, who was approximately 75 years old, he was a parking lot guard at the bank, to give an in-court identification. It was agreed that that witness who had not seen the defendant since the time of the robbery might see a number of pictures and see if he could pick out from that group of similar pictures the picture of the defendant. Defense counsel participated in the selection of the pictures, and I rejected about, I think, four of the first six pictures that the Government proposed to show to the witness, because they were older people, darker people and so forth. We finally got together a group of ten pictures which were of approximately the same age, approximately the same complexion, and I think most of them had mustaches, and the defendant had a mustache, so that in that case there was an agreement between counsel that those pictures should be shown to the defendant, and they were shown to the

[fol. 58] witness and they were shown to the witness in the presence of counsel. However, the defense there is it was a question of primary qualification of the witness to give an in-court identification, and the Government did seek to show this evidence by way of buttressing the selection by the witness of the defendant in Court.

Here, I think since this was an ex parte, and since it might go to the question of qualifications of the witness to make an in-court identification, that I might preclude this evidence. I haven't yet made up my mind on it, but I would not on that basis preclude an in-court identification.

MR. ROSEN: I am sorry, I didn't hear your last comment.

THE COURT: I would not preclude an in-court identification just because a picture was shown, a picture was selected from five.

MR. ROSEN: Let me say this to the Court: Your Honor, I had a similar matter before Judge Youngdahl about a month ago, also a Wade problem. I don't know if you saw the opinion he wrote. Possibly he has the jacket. The case was dismissed this morning, United States against Wilson and Davis, which is in 1220-67, which was an interesting point on the Wade problem. [fol. 59] The more I think about it, Your Honor, I think in light of the fact there was an identification yesterday, and I think the Court might agree with me that the identification of photographs would be a person saying that it would be the reproduction of a person, of the image and would be tantamount if they had a lineup yesterday, five people, Mr. Ash, Mr. Bailey, and these other three people.

Now, as far as I am concerned, Your Honor, this purely is a Wade problem as I see it, because this is post-indictment even though Judge Youngdahl denied the persons position that was required in the critical stage in light of everything eminating from Miranda. Your Honor, we have a post-indictment, we have right to counsel clearly attached.

THE COURT: That relates to the individual, not counsel's preparation for the case for trial.

MR. ROSEN: No, I am not talking about that.
THE COURT: I am.
MR. ROSEN: My problem basically is that I have no objection with counsel prepared us. The point is this: —
THE COURT: I have said unless Mr. Sepenuk can show me a reason for my allowing him to bring out this evidence, I will simply exclude this evidence which is somewhat buttressing the inability of the witness to identify the defendant in Court.
[fol. 60] MR. ROSEN: I would go one step further, I think, in all in-court identification at this junction is taken for this reason, they have not seen the two people, any identification, since the date of the offense, other than the showing of the photographs by Agent Markowvich in February of 1966.
Let's assume, for arguments sake, the Court does not find any violation—any Stovall problem, any violation of due process. It wasn't suggested in any way they showed a good, full representation of people of similar height, weight, age or build, and appearance, and they were able to select Messrs. Ash and Bailey.
The only purpose in a different situation, we do have Wade, Stovall, Gilbert, Simmons, Miranda, all on the books, different standards of conduct, police conduct that now apply. These people have not seen the likeness or the image of the participants, Mr. Ash or the alleged participation of Mr. Ash and Mr. Bailey since those photographs. I think your Honor raised the point of this parking lot guard. There is a lot of water over the dam since February of 1966, possibly their recollection might have been weakened, which I think clearly is the purpose for which Mr. Sepenuk showed them the photographs, as you say, to buttress their identification.
[fol. 61] Here we have a situation where the rights to counsel attaches. Now, it would be just improper, and I think you would agree with me—
THE COURT: This right to counsel attaches to any conference that the Government counsel might have with the accused persons.

MR. ROSEN: I don't reach Wade or Stovall, I think it goes to confrontation between the accused and the eye witness.

THE COURT: No, I disagree with you on that.

MR. ROSEN: I think the direct—

THE COURT: Either counsel may talk to the eye witness.

MR. ROSEN: I am not questioning that.

THE COURT: The Government's counsel's preparation for trial doesn't have to include you.

MR. ROSEN: Your Honor, I think you and I are on a different track. Let me make the proffer this way: I have no objection, for example, if Mr. Sepenuk went to any witness, tell me what these men look like. Obviously they are of a certain height and weight and he was wearing certain colors of garments. Then you come out and say, "Is this the man who robbed." She says, [fol. 62] "Well, it looks pretty much like him." I would see no difference in that if he says you come here to the cell block In the U. S. Courthouse and they point out Mr. Ash and Mr. Bailey from the cellblock and say is that the man?

THE COURT: I don't agree with you.

MR. ROSEN: I think the matters are clearly implicit in Wade, Gilbert and Stovall. This is clearly an out-of-court identification. The image is the same as if she saw that person.

THE COURT: Well, Mr. Rosen, you have been very able and built up new law, and you may be building it up out of this case. I don't think that is the case.

MR. ROSEN: I certainly think so.

THE COURT: All right.

MR. ROSEN: Not only that, the other point I was going to make, if Your Honor can recall why I asked the Agents why these different people didn't go down to headquarters to look at a reel of photographs and a mug book, I think clearly in Roosevelt Wright one of the tests—the burden is on the Government to show why there wasn't a fair lineup, and here, as far as I am concerned, showing the photographs is implicitly the [fol. 63] same as a lineup. When you have image, when

you have direct confrontation, I think the burden, and I asked Agent Berry and Agent Markowvich why weren't these people asked to come down to police headquarters. If, for example—

THE COURT: Number 1, Mr. Rosen, before you get off into the wild blue yonder, this is a due process case, Stovall. It isn't Wade and Gilbert.

MR. ROSEN: It isn't Wade and Gilbert, but my contention is that Wade and Gilbert as of the showing of the photographs yesterday.

THE COURT: I disagree with you on that.

MR. ROSEN: That is an excellent argument.

* * * *

[fol. 65] THE COURT: Can you tell us, Mr. Markowvich, who the other defendants are? We have a number of them here. You have some numbers, and perhaps it would assist you if we can get them in the proper order. Which one is Robert Willis?

THE WITNESS: 189696.

THE DEPUTY CLERK: Government's Exhibit No. 7 marked for identification.

(Government's Exhibit No. 8 was marked for identification.)

THE COURT: Theodore Clemens?

THE WITNESS: 188636.

THE DEPUTY CLERK: Government's Exhibit No. 8 marked for identification.

(Government's Exhibit No. 8 was marked for identification.)

THE DEPUTY CLERK: Government's Exhibit No. 9 marked for identification, and Government's Exhibit No. 10 marked for identification.

[fol. 66] (Government's Exhibits Nos. 9 and 10 were marked for identification.)

THE COURT: Which is Number 9?

THE DEPUTY CLERK: Exhibit 9 is Bailey, Your Honor, and No. 10 is Ash.

THE COURT: All right.

FURTHER REDIRECT EXAMINATION

BY MR. SEPENUK:

Q Agent Markowvich, I will hand you Government's Exhibits 6 through 10 for identification which purport to be the photographs of the five individuals which you exhibited on February 3, 1966, to the various Government witnesses. Would you tell us whether in fact those are the photographs?

A I believe the one of Clifton Gregory, No. 201012 is the same.

Q Is that Government's Exhibit No. 6?

A Yes, sir.

THE COURT: You mean the identical one or the one from the same negative?

THE WITNESS: It is off the same negative; it is not the original that I exhibited.

THE COURT: All right.

[fol. 67] THE WITNESS: The one of Mr. Bailey, No. 123909, according to the photograph, I believe, this was taken 2/1/67, which was taken later than the photograph which I exhibited.

THE COURT: All right, sir.

BY MR. SEPENUK:

Q Is that Government's Exhibit No.—

A No. 9.

Q No. 9, is that or is that not similar to the photograph that you exhibited?

A Yes, it has the same number.

Q Would you please continue?

A No. 188636 of Theodore Clemens is the same number, and I believe that one is identical.

Q What Government Exhibit No. is that?

A No. 8. The one of Robert Lee Willis, 189696 is taken 7/28/67, and would be similar to the one I exhibited as it was taken.

THE COURT: It is not the same negative?

THE WITNESS: No, sir. The one of Charles James Ash, No. 156672, is not the photo I exhibited. This was taken 1/5/67.

[fol. 68] BY MR. SEPENUK:

Q Do you have a photograph of Mr. Ash you exhibited?

A I have a reproduction of that photograph.

MR. SEPENUK: May that be marked Government's Exhibit No. 11, please?

THE DEPUTY CLERK: Government's Exhibit No. 11 marked for identification.

(Government's Exhibit No. 11 was marked for identification.)

BY MR. SEPENUK:

Q Can you say whether or not the photograph that you showed of Robert Lee Willis was similar to the photograph of Mr. Willis that is presently before you?

A Yes, sir, it has the same identification number.

MR. SEPENUK: Your Honor, I would move the introduction of Government's Exhibits Nos. 6 through 11.

THE COURT: Have counsel seen the photographs?

MR. ROSEN: No, I haven't, Your Honor.

THE COURT: You take a look at them, gentlemen.

MR. ROSEN: I have no objection to the admission.

MR. STANFORD: I have no objection.

THE COURT: While you are examining the photo-
[fol. 69] graphs, I will take up another matter.

(A short recess.)

MR. SEPENUK: Your Honor, I move the introduction in evidence of Government's Exhibits Nos. 6 through 11.

THE COURT: Have you gentlemen seen them?

MR. STANFORD: No objection.

MR. ROSEN: I have no objection. I want the record to show I don't know what the purpose of introducing these in evidence is other than unless Mr. Sepenuk plans to introduce them ultimately to show prior identification. I think the Court might have a Barnes problem, and I think he has a chance to avoid it.

THE COURT: You are quite right about that. Those are hearing exhibits, Mr. Rosen.

MR. ROSEN: I have no objection.

MR. SEPENUK: They are hearing exhibits.

MR. ROSEN: I also move the other exhibits in evidence.

THE COURT: All the pictures are in.

MR. ROSEN: Plus the two police reports.

THE COURT: All hearing exhibits will be received in evidence.

MR. ROSEN: Thank you.

[fol. 70] THE COURT: Here are the other exhibits.

(Government's Exhibits Nos. 6 through 11 were received in evidence.)

THE COURT: Do you gentlemen have any further questions of Mr. Markowvich?

MR. ROSEN: Just one or two.

FURTHER RECROSS EXAMINATION

BY MR. ROSEN:

Q Agent, do your records reflect what order these were shown? Was it the same order you read to us?

A That I cannot state positively, no, sir.

Q Now, you say this Government's Exhibit No. 11 is a reproduction of the photo of Mr. Ash that was shown?

A That is to the best of my recollection.

Q Is this Government's Exhibit, Mr. Bailey, is that the same picture of Mr. Bailey that was shown?

A To the best of my recollection, yes, sir.

Q Now, just one more question on the photograph, Exhibit No. 11. Was this number put on recently or was that marked in the reproduction process?

A I believe that was on the original negative of that picture.

[fol. 71] MR. ROSEN: I have nothing further.

THE COURT: All right.

MR. STANFORD: I just have one question, Your Honor. After viewing one area of questioning.

FURTHER RECROSS EXAMINATION

BY MR. STANFORD:

Q I want to know, Agent Markowvich, referring to Government's Exhibit No. 7, which is of what person?
A Robert Lee Willis.
Q Do you know Robert Willis' age?
A No, sir, I don't.
Q And this is Government's Exhibit No. 6, is that Gregory, I believe?
A Yes, that is correct.
Q Do you know his age?
A Not off hand.
MR. STANFORD: I have nothing further.
MR. SEPENUK: That is all we have.
THE COURT: All right, sir, I believe you said that Detective Fallin is here.
MR. SEPENUK: Yes, Your Honor.
THE COURT: Thank you, Agent. You may be excused.

(The witness was excused.)

[fol. 72] MR. SEPENUK: Sergeant Fallin.

Whereupon,

WHELAN H. FALLIN

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q Sergeant Fallin, state your full name, please?
A Detective Sergeant Whelan H. Fallin.
Q What is your position?
A I am a detective sergeant assigned to the United States Senate Security.
Q On February 18, 1966, were you connected with the Robbery Squad of the Metropolitan Police Department?

A I was.

Q Were you engaged in the investigation of a robbery at the American Security & Trust Company, East Capitol Street branch?

A I was.

Q On that date, February 18, 1966, were you present in the Court of General Sessions with FBI Agent Markowvich and Sergeant Lynn of the Metropolitan Police Department?

[fol. 73] A I was.

Q Was that for the purpose of perhaps possibly identifying one of the defendants in this case?

A Yes.

Q Who was the lady to make the identification?

A Her name was Mrs. Apple, Mrs. William Apple.

Q Is that Betty Apple?

A Yes.

Q And tell us what Mrs. Apple did at that time in identifying or not identifying the defendant?

A Mrs. Apple was in the corridor of the Court, and it was about 10:00 or 10:30 a.m., and she pointed out to Sergeant Lynn the subject which she said was one of the men that she believed was involved in the bank holdup in which was the subject of an investigation at 9th and East Capitol. The person she identified and pointed out was the subject at the table over there, John Lee Bailey.

Q Tell us where Mr. Bailey was standing at the time the identification was made? Where was Mr. Bailey located?

A Mr. Bailey was located in the corridor with another man and woman.

Q Who else, if anyone, was in that vicinity?

[fol. 74] A I was there and Agent Markowvich from the FBI and Mr. Bailey had, I believe, his brother was with him and another lady, I am not sure, I think it was his wife.

Q Were you and Agent Markowvich standing together?

A Yes.

Q How far from Mr. Bailey and his group?

A Ten to fifteen feet.

Q Was there anybody else in the corridor? What was the condition of the corridor?

A The corridor at that time of the morning, I would say, I would say the whole corridor there had fifty to sixty people in it.

Q Did you make any suggestion to Mrs. Apple that she should identify Mr. Bailey?

A No, no.

Q Did you attempt to single out Mr. Bailey for special treatment?

A No, sir.

Q Did you tell Mrs. Apple the nature of any evidence the Government may or may not have had against Mr. Bailey?

A No, sir.

MR. SEPENUK: I believe that is all, Your Honor.

[fol. 75]

CROSS EXAMINATION

BY MR. STANFORD:

Q Sergeant Fallin, had you know Mrs. Apple at all prior to the meeting here in connection with this case?

A No, sir.

Q Did you see her on the day that this robbery occurred, August 26, 1965?

A Yes, sir.

Q Did you see her subsequent to that but prior to February 18, 1966?

A Yes, sir.

Q And on how many occasions?

A One.

Q And when was that?

A I can't remember the date unless I refer to my notes. It was a few days prior to the date in question.

Q Would you refer to your notes, please?

A January 23, 1966.

Q At that time did you show Mrs. Apple any photographs?

A Yes, sir.

Q And what photographs were shown to her at that time?

A There was a group of photographs consisting of [fol. 76] five. I don't have the photographs with me.

Q Do you know the names of the persons whose photographs were shown?

A I know two of the people involved—I mean two of the people—two of the photographs, I know two of the photographs, and I don't remember the other name.

Q Could you give us the two that you knew?

A The two I know, Charles Ash and John Lee Bailey.

Q If I suggested the name of Willis, Gregory or Clemens, would that refresh your recollection?

A Yes, sir.

Q Can you identify what has been marked as Government's Exhibits Nos. 6, 7, 8, 9, 10 and 11?

A This is one of the subjects.

Q You are referring to Government's Exhibit No. 6?

A Yes. This is a picture of Ash. That is a duplicate of the picture I showed her. This is a picture but it is of Ash, but it is not the picture I showed, not a duplicate.

Q You are referring to Government's Exhibit No. 10?

A Right. This is a duplicate of the picture I showed her of Ash.

Q What Exhibit is that?

[fol. 77] A 11. This is a photograph of John Lee Bailey, this is another photograph I showed her. This is a duplicate of the picture I showed her.

Q That is exhibit number?

A No. 9.

Q And the next?

A The name escapes me.

Q Which one are you referring to when you say the name escapes you?

A Both of them, these are the other two.

Q These are Government's Exhibits Nos. 7 and 8?

A That is right.

Q But were these two photographs—

A No, this one—these were the duplicates of the photographs, these were the two, not the original photographs I showed her.

Q These are not the original photographs, but were they made from the same negative?

A Yes.

Q That is Exhibits Nos. 7 and 8 which were made from the same negative and is of the same person?

A To the best of my knowledge, they are, yes, sir.

[fol. 78] Q Was Detective Lynn with you at the time you showed these photographs to Mrs. Apple on January 23?

A Yes, he was.

Q Do you know whether Mrs. Apple was shown these photographs at any other time?

A Not to my knowledge.

Q Do you know if Sergeant Lynn spoke to Mrs. Apple at any time other than this?

A I don't believe he did, because he and I were assigned to the case, in this case we were working together. We have the same days off. I don't feel he did.

Q Did you subsequently turn these photographs over to Agent Markowvich of the FBI?

A The photographs we showed?

Q Yes.

A No.

Q Do you know whether Agent Markowvich showed these photographs to Mrs. Apple subsequent to your showing her on January 23, but prior to February 18?

A He was present on January 23, when we showed them to her. If he did at any other time, I do not know.

Q Sergeant Markowvich was present with you and Sergeant Lynn at the time you showed the photographs to Mrs. Apple on January 23?

[fol. 79] A That is correct.

Q When you and Sergeant Lynn and Agent Marruary 18, who notified her of the fact you wished her to go down to the Court for identification purposes?

kowvich went to the General Sessions Court on Feb-

A I do not know.

Q Do you recall what you said to her the purpose of your going to General Sessions?

A I say I don't remember. I know I didn't notify her.

Q You didn't initiate the call?

A No.

Q Do you know whether you said anything to her after you first met her that day but prior to seeing Bailey in General Sessions Court?

A I don't remember.

Q Do you recall whether you or anyone in your presence said to her why you knew that Bailey was going to be at this location?

A No, I don't.

Q Did you mention the fact this was a suspect in the bank robbery of August 26, you wished to have her look—I am referring to you or any other person, Ser- [fol. 80] geant Lynn or Agent Markowvich? Did you say that you wished to have her to see whether this was one of the men connected with the bank robbery?

A She had identified the photograph of John Lee Bailey from the file that was displayed to her, and she stated at that time she had routed to see the person, this person in person, and there did come a time when we learned of his going to Court. I don't know who notified her to be there or how come she was there. She said she wanted to see him in person.

Q Were you present—strike that.

When you say that she identified Bailey from the photograph which you showed her, was that on January 23?

A Yes.

Q Do you recall her words in connection with that?

A She stated that she was quite sure this was the person, but she would rather see the person in person before she could make a positive identification.

Q She did not say, "This could be one of the men"?

A I don't remember the exact terminology, but I was led to believe she was—she thought that it was him, but she would not be 100% sure.

Q Did you or Sergeant Lynn or Agent Markowvich tell her that she was going down to see this man whom [fol. 81] she identified in the photograph, that is, did you tell her you were going to show her in person the man whose photograph you had shown her on the 23rd of January?

A No, sir.

Q Did you get anything from—did you gleen anything from what she had said to indicate that she believed that this was the man whose photograph was shown to her on that date?

A I didn't quite get you.

Q Now let me rephrase that.

She said on January 23, or some time subsequently that she wanted to see the man in person whose photograph she was shown on January 23, is that correct?

A She said before she could make a positive identification she wanted to see the person.

Q She wanted to see the person whose photograph she had been shown?

A That is right.

Q And thereafter, do you know whether she was told that she was going to see this man whose photograph she was shown?

A No, she wasn't. I tell you this, as well as I recall, that came as a surprise in the Court, the corridor of the Court. I did not know John Bailey was in the Court-[fol. 82] house. She came up and I heard her walk to Sergeant Lynn and told him she had seen the man, she believed, that was one of the holdup men at the bank. At that time she pointed out John Lee Bailey.

Q You did not know the purpose of your going to Court that day?

A I knew the purpose of my knowing, but I didn't know he was yet in the Courthouse.

Q Do you know whether Sergeant Lynn had seen him prior to Mrs. Apple's seeing Bailey?

A It was my belief he had not. It was a surprise to him.

Q What floor of the General Sessions Court was that?

A The first floor.

Q The first floor?

A Yes.

Q And where was that?

A It was in the hallway or the corridor.

Q I am fairly familiar with that corridor. Could you tell us where in relation to that part, was that the central part, where the central part of the corridor is, where the elevators are?

A No, it was between the elevators and E Street.
[fol. 83] Q It was about halfway between?
A It was in the corridor. I am not sure whether it was the first or second floor. It was in the corridor between the middle of the elevators of the Municipal Court and E Street. It could have been the first or second floor.
Q How long were you on that floor, whether it was the first or second floor, how long were you in the General Sessions Court building, presuming you walked directly to the general area when you learned of her identification?
A I had just gotten there.
Q Would you say it was a matter of ten seconds?
A No, longer, five or ten minutes.
Q Five or ten minutes?
A Yes, sir.
Q Had you been walking around in that area? Had Mrs. Apple been walking around in that area for five or ten minutes before?
A No, I just walked up to her.
Q Maybe I better get the mechanics straight. Did you all go in at the same time?
A I cannot remember; I do not know.
Q Do you know who drove her to General Sessions Court? Did you drive her in a police automobile?
[fol. 84] A No, I didn't.
Q Did you meet her there?
A I met her in the corridor.
Q Do you know whether anybody drove her there?
A I do not know.
Q Where did you tell her you would meet her there?
A I say I don't remember.
Q Did Sergeant Lynn accompany you to General Sessions Court?
A I don't remember that; I don't know.
Q Do you know how long she had been there when this identification was made?
A I do not.
MR. STANFORD: I have nothing further.
MR. ROSEN: May I inquire?
THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. ROSEN:

Q Sir, when you went with the FBI Agent and showed these photographs, I take it you identified yourself as a police officer, is that correct?

A Yes, sir.

[fol. 85] Q All right. At that time your rank was a Sergeant in the Robbery Squad?

A Yes, sir.

Q Now, at any time did you tell these various people what the purpose of your being there was? In other words, did you tell them you were coming to see them to show them some photographs, could they identify certain people?

THE COURT: I think you made your question more specific. Identify the witness to whom you were talking and the time.

BY MR. ROSEN:

Q At the time you were talking to Mrs. Paugh, can you tell us did you at any time tell her that the purpose of your visit with the FBI Agent was to show her photographs of an alleged suspect from the robbery, this particular robbery involving Mr. Ash and Mr. Bailey and ask if she could identify either one of them out of this group?

A Well, we don't operate like that.

Q How do you operate?

A Well, we don't tell people we are showing them suspects in a particular case, we show them pictures, we have pictures we would like them to take a look at and do they think they can make an identification.

[fol. 86] Q At any time did you ask her or did you mention to her the identification was pertaining to this particular robbery of the American Security and Trust Company on August, 1965?

A Well, I didn't say that; I didn't make that statement, sir. I presumed she knew it was pertaining to that robbery.

MR. ROSEN: Nothing further, Your Honor.

THE COURT: I have one question, Sergeant. I just want to be clear about Exhibit No. 8. Was that shown by you to Mrs. Apple?

Do you have the exhibit?

THE WITNESS: Yes, sir.

THE COURT: You notice the date on that, the date on the mug shot?

THE WITNESS: Yes, sir.

THE COURT: 8/15?

THE WITNESS: Yes, Your Honor.

THE COURT: What was the date on that?

THE WITNESS: 8/15/64.

THE COURT: That was one of the pictures you showed her?

THE WITNESS: Yes, Your Honor.

[fol. 87] THE COURT: I see.

THE WITNESS: It was my belief it was.

THE COURT: Now, No. 9, I believe, you said was not the picture that was shown, is that correct?

THE WITNESS: That is right.

THE COURT: No. 10 was not a picture that was shown?

THE WITNESS: That is correct.

THE COURT: It was simply a picture of the same person taken at a different time?

THE WITNESS: Yes, Your Honor.

THE COURT: All right. Now, anything else, gentlemen?

MR. SEPENUK: Nothing further.

MR. STANFORD: No, Your Honor.

THE COURT: Thank you, Sergeant.

Anything else, gentlemen, you want me to consider?

(The witness left the stand.)

MR. ROSEN: May I have the Court's indulgence?

Your Honor, I would like to call one of the witnesses who saw the photographs.

THE COURT: All right.

MR. ROSEN: I call Mrs. Paugh.

[fol. 88] Whereupon,

RUBY HELEN PAUGH

was called as a witness and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROSEN:

Q Ma'am, would you tell us your full name and address, please?

A Ruby Helen Paugh, 5419 Macbeth Street, Hyattsville, Maryland.

Q Where are you employed? Are you employed at this time?

A Yes, sir, American Securities & Trust Company, 9th & East Capitol Street.

Q Where you so employed on the 26th of August, 1965?

A Yes, I was.

Q Did anything unusual take place that day?

A Yes, there was.

Q Did there come a time after this event happened that you had an opportunity to have a confrontation with Agent Markowvich of the FBI and Detective Fallin of the Robbery Squad?

[fol. 89] A Well, I don't know the gentlemen's names.

Q But the two people you have seen here?

A Yes.

Q This took place at the bank around the 18th of February, 1966?

A (No response.)

Q Well, were you shown some photographs at the bank?

A Yes, sir.

Q All right. Did that take place on the 18th of February, 1966?

A I don't remember if that was the date or not.

Q Did it take place in 1966, approximately six months after the robbery?

A Well, that could be. There were several times that we had conferences about the robbery.

Q Now, did you also have a conference yesterday with Mr. Sepenuk, with Agent Berry and were also shown some photographs?

A Yes, sir.

Q Now, going back to the first time you saw Agent Markowvich, you were shown several black and white photographs?

A Yes, sir, as far as I can remember.

[fol. 90] Q Now, at that time—at the time you saw these photographs, you knew who Mr. Fallin and Mr. Markowvich were. You were informed that one was from the FBI and one from the Police Department?

A Yes, sir.

Q You also knew that the purpose of showing you these photos was to see if you could identify anyone who participated in this particular robbery?

A Yes, sir.

Q Isn't that so?

A That is right.

Q Now, at any time did either gentlemen tell you—discuss with you—ask you anything or say anything other than if you could identify anyone?

In other words, did they say, for example, did any of them or either of them tell you, for example, that a possible suspect had been caught?

A No, sir.

Q And did they tell you or did they ask you or did they say anything to you other than ask you whether you could identify anyone?

A That is all they said.

[fol. 91] Q Now, when you saw—can you recall if you can the various photos that you saw, the black and white photos you saw in your mind?

A No, not really.

Q Did they all appear to you to be similar in appearance in the sense of height, weight, build or whether they had a mustache or not, whether they had long hair or short hair, did they all appear to be similar as far as you can recall?

A No.

Q They all appeared different?

A Different.

Q Different in what respect?

A Some were short, some were tall, some were stout, some were thin, just a collection of photos.

Q It looked like a cross section of people we might say, riding a bus, some tall, some short people, some thin people, some stout people?

A Yes.

Q Can you recall if they were all negro males?

A Yes, there were.

Q I want you to think back to yesterday when Mr. Sepenuk and Agent Berry had this confrontation. All right.

[fol. 92] Did that take place at the bank, I take it?

A Yes.

Q Now, at that time, Mr. Sepenuk introduced himself as an Assistant U. S. Attorney, didn't he?

A Yes, sir.

Q And Mr. Berry introduced himself from the FBI?

A Yes, sir.

Q Didn't he?

Now, since this prior confrontation with Mr. Markowvich, you hadn't seen photographs of any people regarding this bank, isn't that so?

A I haven't seen any photographs.

Q For about a year?

A A year, a year and a half.

Q And you hadn't seen any of the suspects or any one accused of this crime in any sort of a lineup, is that so?

A No, sir.

Q So the only impression you have in your mind are the people who were involved in this robbery is what you saw the day of the robbery and any possible photographs you saw thereafter prior to yesterday, isn't that correct?

A That is correct. Other than what I can't remember of what I have seen.

[fol. 93] Q All right. Yesterday you had this confrontation with Mr. Markowvich and Mr. Berry. Now, isn't it a fact—

MR. SEPENUK: Excuse me, Mr. Sepenuk, myself.

MR. ROSEN: Mr. Sepenuk, I am sorry.

MR. SEPENUK: I wouldn't call it a confrontation, but I was there and Mr. Berry was there.

THE COURT: It was a conference.

MR. ROSEN: I am sorry, a conference with Mr. Sepenuk and Mr. Berry?

THE WITNESS: Yes, sir.

BY MR. ROSEN:

Q At the same time you were also shown photographs, isn't that so?

A Yes, sir.

Q Now, did these—isn't it a fact these photographs that you saw yesterday recreated in your mind the impression that you had or created in your mind an appearance of the person you might have seen at the time of the offense?

A No, not really. They were a collection of photos like the first ones, some were short and tall and varying in sizes. I mean, they didn't leave me with an impression on me, really.

[fol. 94] Q In other words, my point is this: The robbery took place in 1965, and you saw some photos, I believe, six months thereafter, and it has been over a year since you saw or had any—either shown in the pictures or seen anyone possibly involved in the robbery, isn't that correct?

A That is right.

Q Yesterday you were shown some photographs?

A That is right.

Q Did these photographs in any way refresh your recollection or recreate in your mind an image of the person or a person that you saw or might have seen at the time of the offense?

A No, sir, they did not.

Q They did not. You say the appearance of the people looked different? In other words, some looked tall, some looked short, some stocky, some stout?

A That is right.

Q All right. Was there anything on the photographs to suggest to you as to anyone who might be involved in the crime?

A No, there wasn't.

Q Did either Mr. Sepenuk or Mr. Berry say anything regarding anyone who might be arrested or apprehended in this case?

[fol. 95] A No, they didn't.

Q Did they in any way mention to you any evidence that they might have against any person involved?

A No, sir.

Q All right.

MR. ROSEN: Would Your Honor indulge me a moment?

THE COURT: Yes, sir.

MR. ROSEN: I have nothing further, Your Honor.

CROSS EXAMINATION

BY MR. STANFORD:

Q Mrs. Paugh, how many photographs did you see, approximately, six months later?

A After the robbery?

Q Yes.

A I don't remember.

Q Would you say—

A I have been shown photographs several times since the robbery.

Q Several times since?

A Yes, but I don't remember.

Q In how many—how many were in the group when you were shown on the several occasions?

[fol. 96] A I don't remember.

Q Would you say more than a hundred, more than ten, less than ten, give us some general idea?

A It was probably less than ten.

Q Were the same photographs shown to you on each of those occasions?

A I don't know.

Q Did you give a descrtpion to the police immediately following this robbery?

A Yes, sir.

Q Did your description to the police indicate that there was a young man about 19 years of age who was about 6 feet tall, negro, male, light-skinned? Was this your description?

A Yes, sir.

Q Did the photos—were the photographs which you have said numbered something less than ten, including specifically persons who were of entirely different appearance?

A Yes, sir.

Q How many persons would you say in the photographs shown to you meet that general description which I have given to you which you have affirmed?

A Well, I can't say. It was—

[fol. 97] Q When you looked through the deck of photographs, you instantly or almost instantly eliminated several of them because they were specifically of a different color or complexion, shade, different shade, different weight?

A That is right.

Q There were several, however, or were there any in which you—was there a group or only one you identified as being one of the persons?

A Which group?

Q After you eliminated these ones which were obviously different, how many photographs were left?

A Which time are you speaking about when I saw these photographs?

Q How many occasions were there?

A I don't remember. As I say, I saw photographs several times, but probably all, I would have picked out one which to me looked as the subject.

Q At each one of the times you seen these photographs, did they contain persons markedly dissimilar which you gave out to the police?

A Yes, sir.

Q When you looked—you have been affirming that?

[fol. 98] MR. STANFORD: Did you get that, Mr. Reporter?

BY MR. STANFORD:

Q After you eliminated those ones markedly different on each of those occasions, then you picked one whom you identified?

A Yes, I probably picked out one.

Q Now, so you say on each of the occasions when you did make an identification, there were a number of photographs which you eliminated immediately because they were different?

A Yes. They weren't all different. I have been shown three or four that were tall. In my opinion, the suspect was tall.

Q You have said there were some that you eliminated because they were quite different from the description which you gave. Could you tell us how many after this elimination was made of the remaining number?

A No, I can't tell how many.

Q Could you tell us whether any of those were tall or not tall, the ones that remained?

A Well, probably all the ones that remained were tall. To my mind, this was the size of the gentlemen.

Q Did you always in each group of photographs that you were shown, did you always come to the conclusion that some were short and some were tall?

[fol. 99] A Yes, sir.

MR. STANFORD: I have no further questions except Mr. Rosen specifically asked me to request the Court and you—I am standing to block the view of the witness to the two defendants and ask that she not look at either of the defendants at this time as she leaves the Courtroom.

THE COURT: I am not going to have her blindfolded. You gentlemen have witnesses to come in and your defendants are entitled to be in here. If you want to have the defendants removed, you may do so.

MR. STANFORD: Your Honor, I think what I intend to do—I think we came to the conclusion after she was here, I think this is the same procedure, but it doesn't specifically affect Mr. Bailey.

THE COURT: All right.

MR. STANFORD: I request that.

THE COURT: Do you gentlemen have any further questions?

MR. ROSEN: Just one last question.

REDIRECT EXAMINATION

BY MR. ROSEN:

Q Mrs. Paugh, of all these photographs that you [fol. 100] looked at, can you recall out of your mind each time you saw them what percentage, so to speak, of the photographs appeared to you to be the tall people as compared to people who are short or fat or stocky or stout?

A No.

Q Can you recall if there were any that appeared—whether there was two tall people?

A I don't know.

MR. ROSEN: Nothing further.

THE COURT: All right.

BY MR. ROSEN:

Q On the day after, were you ever shown any photographs?

A I don't remember, but I think we probably were.

Q Do you remember if you identified anybody?

A I coudn't identify anybody.

Q Were you ever called down to police headquarters or the FBI headquarters to identify photographs?

A Yes, I was.

Q Can you recall when that took place?

A No, I can't.

THE COURT: It is immaterial if she sees them.

[fol. 101] BY MR. ROSEN:

Q Can you recall if you identified anyone on those occasions?

A No.

Q No, you can't identify, or you didn't identify?

A I didn't identify.

MR. ROSEN: I have nothing further, Your Honor.

THE COURT: All right. Thank you, you may be excused.

Did you have anything?

MR. SEPENUJK: No, I didn't. I just want to qualify the last point.

CCROSS EXAMINATION

BY MR. SSEPENUK:

Q Can you reecall whether or not you identified people? The fact that ycou can't recall whether you made any identity on those occasions, what is your answer to that question?

A Well, I knoow that I didn't surely identify anybody as to say it was that person.

Q But on a ccertain occasion, did you make an identification?

A I would saay a general build of the person, that is all I know.

[fol. 102] MR. SSEPENUK: Thank you.

THE COURT: You are referring to the times you went to either thee FBI headquarters or to police headquarters?

THE WITNESSS: Each time I was questioned or shown photographhs, I would have done the same thing as to the general build of the person. Other than that, I couldn't identify them.

THE COURT: All right.

THE WITNESSS: For certain.

THE COURT: Anything further?

MR. SEPENUKK: No, Your Honor.

MR. ROSEN: No, Your Honor.

THE COURT: You man step down. Anything else gentlemen?

(The witness left the stand.)

MR. ROSEN: No, Your Honor.

THE COURT: I think under the Roosevelt Wright decision what we are confronted with here is the due process, the Stovall issue and not Wade or Gilbert, and since the Government must be afforded an opportunity to establish by clear and convincing evidence that an in-court identification is based on observation of the

suspect other than the intervening observation, that burden has been met and the Court should permit the [fol. 103] Government to allow testimony on this subject. What the testimony will amount to, I don't know. We haven't had any testimony on this subject today, but I will not preclude on what I have been advised at the pretrial, I will not preclude the opportunity for this in-court identification. I think the Government has established a basis for an in-court identification by clear and convincing evidence.

* * * *

[fol. 109] MR. ROSEN: I move the Court to review the motion to dismiss for lack of a speedy trial in this case.

THE COURT: All right.

MR. ROSEN: I ask the Court to take it under advisement.

THE COURT: All right. The same for you?

MR. STANFORD: Yes, Your Honor.

* * * *

[fol. 121]

PROCEEDINGS

(Whereupon, the following proceedings were had in open court outside the presence and hearing of the Jury.)

THE COURT: Gentlemen, it is the Court's understanding in the case of Bailey and Ash you wish the two defendants to remain where they are now until the Government's witnesses have been identified to the Jury panel, is that correct?

MR. STANFORD: Yes, I do with regard to Bailey. However, I would ask the Court if I may recall Sergeant Fallin to ask just about three or four questions. I mentioned this to Mr. Sepenuk prior to today's convening.

THE COURT: All right.

MR. STANFORD: Then I would want to ask and which I did not mention to him, to call Mrs. Apple for about four questions. I think it is after rereading these cases, I think it is rather important.

THE COURT: All right.

MR. STANFORD: I would be very brief, Your Honor.

THE COURT: I assume you want the defendants out?

MR. STANFORD: I would like to have them present here.

I would like to call Mrs. Betty Apple.

THE COURT: All right, sir.

[fol. 122] MR. STANFORD: Before they are brought in, I would like to have Mr. Bailey here with regard to Mrs. Apple.

Whereupon,

BETTY McCARDON APPLE

was called as a witness and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STANFORD:

Q Give us your name, please?

A Mrs. William Apple.

Q And your own first name?

A Betty McCardon.

Q Mrs. Apple, were you an employee of the American Securities & Trust Company on August 26, 1965?

A No, sir.

Q I see. You were a patron of the bank or your husband was?

A I was sitting outside of the bank.

Q Now, subsequent on that particular day, following the events of that day, were you questioned by police officers concerning a description of some men?

A Yes, sir, I was.

[fol. 123] Q And did you give a description of an older of the two? Did you say one was younger and one was older?

A I said both were about in their 30's.

Q Both in their 30's? What description did you give them?

A Well, I'm not too sure, because it is almost four years ago.

Q Did there come a time when you were shown photographs?

A Yes.

Q And how soon was that after the occurrence?

A Well, about in 1966.

Q Was it about six months later?

A I guess so.

Q It was some time in January or February of 1966?

A Around there.

Q I am not trying to confuse you, but the police officer testified he showed you a photograph on January 23rd, is that in accord with your recollection?

A It may have been.

Q Was this the first time you had seen photographs at all of persons?

A Yes, sir.

[fol. 124] Q What was told to you by the officers at the time, the officer or Agent Markowvich of the FBI at the time these photographs were shown to you? Was anything said about the photographs that were shown to you?

A No.

Q What did you believe them to be?

A Well, I said that I thought that was the two men, I wasn't sure.

Q Now, before they showed you any actual photographs, what did they—what did you believe them to be? In other words, the officer whom you met in August of 1965, was Sergeant Fallin. Do you remember him?

A No, I don't.

Q The tall grey-haired gentleman who is outside today, one of the police officers?

A Yes.

Q When he came to you, you did not know him except in connection with this case, is that correct?

A No, I didn't.

Q When he showed you photographs before you actually viewed the photographs, what did you believe these

—did you believe these to be what? What did you think was his purpose of showing you these photographs?

[fol. 125] A Well—

Q I mean, you didn't—these were not prospects to be put on the tops of baseball cards? You knew it was not in that connection? In what context did you believe these photographs were shown to you?

A (Nodding.)

Q You do not know why?

A No.

Q Now, did you give any description as to the color and complexion? I don't mean as to the color as to race, but the shade of complexion of the men to whom you described to the police?

A I said the fellows were not too dark complected.

Q Were not too dark complected, did you say?

A Yes.

Q I show you what has been marked Government's Exhibit No. 8, do you recall whether this one is a photograph that was shown to you when you first saw the photographs from—shown to you by police officer Fallin?

A I am not positive myself.

Q Would this immediately—by looking at this photograph I am referring to Government's Exhibit No. 8, [fol. 126] would this immediately in your mind be eliminated from consideration as one of the men by virtue of the description which you have given?

A Yes, I believe it may have been.

Q It was immediately eliminated because for what reason, as to shade?

A Yes.

Q Was this too dark to be considered by you as one of the men?

A No, it is not too dark.

Q Was there any other reason why you immediately eliminated this from consideration?

A No.

Q Now, I show you what has been marked and received in evidence as Government's Exhibit No. 7, for this hearing, by virtue of your description of age was this—

MR. SEPENUK: Your Honor, excuse me for interrupting, may I make one comment. I don't object again, but I do think it might be irrelevant. The purpose to show these if there is any overreaching on the part of the officers in showing the photograph. Now, we are going to go essentially to trial here, and I really don't think it is quite pertinent. I won't offer the same objection, but I do feel—

[fol. 127] THE COURT: I think the question is whether the identification was unnecessarily suggestive.

MR. STANFORD: Pardon me, Your Honor.

THE COURT: I think the question whether the officer was unnecessarily suggestive in showing the photographs.

MR. STANFORD: Yes, Your Honor, and as a corollary to that, whether the photographs themselves by virtue of their disparity and marked difference would be in itself suggestive to the witness, so although it is one conduct which has been criticized by the Supreme Court has been the suggestion made by the officer, we have the fact inherent in the presentation of the photos, and there may be such a difference that they would be subject to immediate elimination.

THE COURT: That would be a question for the Court, isn't it?

MR. STANFORD: I think it would. I definitely think it is for the Court. If the witness who saw it immediately eliminated, one who had given a description, all that must be taken into consideration by the Court.

THE COURT: I would sustain the objection.

BY MR. STANFORD:

Q I show you what has been marked Government's Exhibit No. 6, do you know if this is one of the photos, those here?

[fol. 128] MR. SEPENUK: I thought that was precisely the objection that was sustained.

MR. STANFORD: I didn't think the objection went to that point. I was not continuing on that area.

THE COURT: I don't know what No. 6 is. A number of pictures were subject to the interrogation yester-

day. We know what the pictures are. Presumably this witness did make her identification.

MR. STANFORD: Very well, I will not pursue that with Mrs. Apple. I would like to ask her, however, in connection with the latter instance which occurred, I believe the officer said, on February the 18th.

BY MR. STANFORD:

Q Do you recall going to General Sessions Court with Special Agent Markowvich of the FBI, Sergeant Fallin and Sergeant Lynn?

A Yes.

Q You were at that time—who had contacted you to go to that meeting, which one of those three requested you to come there?

A (Nodding.)

Q You don't know or recall at this time?

[fol. 129] A No, I don't.

Q Do you recall where you met them or where they met you?

A (Nodding.)

Q Do you recall what was said to you about the purpose of going to General Sessions Court?

A No.

Q Now, was anything said to you with regard to identity prior to your going down to General Sessions Court?

A No.

Q Well, did you think it was before you got to General Sessions Court, did you think you were going down there in any way in connection with this bank robbery on August 26th?

A No, I didn't.

MR. STANFORD: May I have the Court's indulgence?

THE COURT: Yes, sir.

BY MR. STANFORD:

Q Let me ask you this: How many times have you seen photographs of people you identified subsequent to the initial identification? How many times have you seen photographs of those two men?

A About twice.

[fol. 130] Q And how many times have you come to Court and seen two men who were pointed out to you as the two men you identified?

THE COURT: I think that question should be rephrased. You are assuming facts not yet in evidence.

MR. STANFORD: All right.

BY MR. STANFORD:

Q How many times were you brought to Court and—were you brought to Court?

A No times in Court, no.

Q Have you ever seen the man whom you saw in General Sessions Court at any time subsequent to that occasion, that is, anytime after February 8, 1966?

A No, I don't think so.

MR. STANFORD: I have nothing further, Your Honor.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. ROSEN:

Q Mrs. Apple, I have certain questions for you: After the robbery, did there ever come a time when you were asked, for example, when you were asked to go to the Metropolitan Police Department Headquarters and look at certain photographs?

[fol. 131] A No.

Q You never were?

A No.

Q Were you ever asked to go, for example, to the FBI to go look at photos?

A No, not that I recall.

Q Now, was the incident—was the incident Mr. Stanford spoke to you, the showing of photographs to you, I believe a series of photographs, was that the first time you saw photographs?

MR. SEPENUK: Mr. Stanford is the gentleman who just questioned you.

BY MR. ROSEN:

Q The gentleman that just questioned you, is that the first time you saw any photographs?

A No.

Q Was the first time—when was the first time that you saw photographs, can you recall that?

A No, I can't.

Q Can you tell us under what circumstances you saw these photographs?

A No, I can't.

[fol. 132] Q Did someone come to you at the job where you were working at a job to show you pictures?

A Yes.

Q Can you recall the name of the person?

A No, I can't.

Q Was he here today? Did you see him in the witness room, can you recall?

A No, I can't recall.

Q Can you give us some general description of that person? Can you, for example, recall if he is a member of the Federal Bureau of Investigation or the Metropolitan Police Department?

A (Nodding.)

THE COURT: What is your answer?

THE WITNESS: (Nodding.)

THE COURT: You have to say yes or no.

BY MR. ROSEN:

Q You have to say yes or no so that the reporter can take it down.

A (Nodding.)

THE COURT: You are shaking your head. You mean to relpy "no"?

[fol. 133] THE WITNESS: No.

THE COURT: All right.

BY MR. ROSEN:

Q Can you tell us where these photographs were shown to you, the first time you saw these photographs? Was that at your job?

A I believe it was at my job.
Q And where were you working at the time?
A It is at the Savarin Restaurant.
Q Is that over here at Union Station?
A Union Station.
Q What position do you have there?
A A waitress.
Q At that very first time—are you all right? Do you feel sick, are you extremely nervous?
THE COURT: What is your question?
MR. ROSEN: She seems to be exceptionally tense.
THE COURT: I understand. Go ahead.

BY MR. ROSEN:

Q Now, was there anyone at that time say anything—
MR. ROSEN: Your Honor, may we have a five minute recess. Mr. Stanford suggests possibly we can [fol. 134] request Mrs. Apple to take an aspirin, and then Mr. Stanford can call Detective Fallin back to the stand.
THE COURT: Counsel come to the Bench, please.

AT THE BENCH:

THE COURT: I have noted in these hearings of this character that witnesses who are simply citizens attempting to perform a public duty seem to be the receivant of conduct which brings about this result. It happened before. I am not blaming counsel for the nature of this conduct, I know you have your duty to perform, but it is obvious to the Court this lady has very little recall of the precise details surrounding the identification. I see nothing demonstrated of any overreaching. She is embarrassed because her recollection is not clear on these incidents. I don't think it adds anything to the question before the Court at this time.
MR. ROSEN: My only concern with the witness, Mr. Stanford has a problem with the identification at the Court of General Sessions. What I am concerned about, it is almost more—I think Mr. Sepenuk's conduct in showing the photographs the other day to those witnesses,

and I am merely concerned if in fact the showing of these photographs, taking of the witness as Mrs. Apple, who has a vague recollection, and I am sure if I were [fol. 135] in her position, I would have too, seeing something three years later and having a vague recollection. I want to know if in fact this refreshes her mind, mostly the appearance for identification of the people.

THE COURT: You asked those questions of the prior witness.

MR. ROSEN: Yes, I wanted to ask that of her, and I think this is still my contention. I reread Wade last night, and I think—

THE COURT: Wade is not applicable in this situation.

MR. ROSEN: Well, you and I disagree.

THE COURT: This is a pre-Wade case, and Wade is not retrospective.

MR. ROSEN: I am not saying that. You have a horse of a different color, and once you go after Wade to five people—let me phrase a hyperthetical with the Court, suppose Mr. Sepenuk and these photographs went to the cell block—five people, three stangers and two—Mr. Bailey and Mr. Ash—went down there, then we have a Wade problem even though the event took place.

THE COURT: I disagree. Counsel has a right to prepare his case with witnesses prior to trial. If he did [fol. 136] not, he would be derelict just the same as you would.

MR. ROSEN: I don't know.

THE COURT: That is the only issue about showing photographs or refreshing the witness's recollection or statements or anything, that is his duty.

MR. ROSEN: I don't even question that.

THE COURT: Counsel is entitled to be present at that stage of it.

MR. ROSEN: I think so.

THE COURT: When interviewing witnesses, you are entitled to be present, of course.

MR. ROSEN: No, that is not my point. When he brings those witnesses face to face with the facts when

the accused is not present, that is clearly a Wade problem, post-indictment, if there is ever one.

THE COURT: With the accused, not with the photographs.

MR. ROSEN: It is not the same.

THE COURT: This is different.

MR. ROSEN: I agree with you entirely.

THE COURT: The Court has never ruled that way.

MR. ROSEN: I think they are going to be in the case.

[fol. 137] THE COURT: All right, you may take it up later. I have made my ruling.

This witness may at this time be withdrawn and you may question Sergeant Fallin.

MR. ROSEN: Very well.

IN OPEN COURT:

(The witness was excused.)

MR. STANFORD: Sergeant Fallin.

I would like to have Mr. Bailey.

Sergeant Fallin has ben sworn, Your Honor, from yesterday.

Whereupon,

WHELAN H. FALLIN

was recalled as a witness and, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. STANFORD:

Q Sergeant Fallin, very briefly, I think I mentioned this to you in the hall prior to our convening today.

On the date that you first showed photographs to Mrs. Betty Apple, had you ascertained whether or not Defendant John Lee Bailey was available to be shown personally?

[fol. 138] A Yes.

Q And what did you ascertain?
A I found he was not.
Q He was not?
What factual—actually, what did you find with regard to that?
A The fact he was not in custody and I had no way of knowing where—of his whereabouts.
Q You just ascertained he was not in custody. Did you ascertain where he was or where he worked at that time?
A At that time I am not sure.
Q So you don't know whether he was readily available at the job or at his home, you just know he was not in custody?
A When I say readily available, I have no way of letting the witness see him at his home.
Q You didn't—
A That is what I mean by not readily available.
Q You did not make any inquiry when he was not in custody?
A That is correct.
MR. STANFORD: I have nothing further of Sergeant Fallin.
[fol. 139] MR. ROSEN: I have some questions.

BY MR. STANFORD:

Q How did you learn or when did you learn that John Bailey was going to be at General Sessions Court?
A Through the investigation, I learned through his bondsman.
Q You learned through his bondsman. Do you know approximately when you learned, not as to date, between January 23 and February 18, February 23, being the date you showed the pictures to Mrs. Apple, and February 18, the day that the union occurred in General Sessions, do you know when in there you learned?
A No, I don't know the date.
Q Prior to the—did you or the police department or anyone in an official executive capacity have anything to do with scheduling his appearance at the General Sessions Court on that date?

A I didn't.

Q Do you recall how you learned who his bondsman was?

A No, I don't.

Q Was—Was this because you learned he was on some charge and was to be in Court at some time in the future?

A That is correct.

[fol. 140] Q Do you know whether his bondsman at that time had the address of his home or where he worked?

A I don't know.

Q You don't know. Do you know whether you made any inquiry with regard to that?

A I don't.

Q Do you know who his bondsman was?

A Weinstein.

MR. STANFORD: I have nothing further.

MR. ROSEN: Nothing further, Your Honor.

THE COURT: All right, you may step down.

(The witness was excused.)

THE COURT: What, if any, additional questions do you have of Mrs. Apple?

MR. STANFORD: I have nothing. I did want to reurge the Court with regard to Sergeant Fallin's testimony that there was no inquiry to determine whether or not this man was available. The first showing on January 23 was a showing of five photographs which the Court must take into consideration as to whether or not there is a disparity between the five which was sufficiently marked so that someone would know truly making a choice, but making a very quick elimination, [fol. 141] that is, they were suggestive inherent in themselves, and as the Court did state earlier that is for the Court to determine. I would ask the Court in view of the description given by Mrs. Apple who is the only one whom we have learned identified Bailey, that there is a disparity, and secondly, we have the fact this man—there was no determination by Sergeant Fallin that Bailey was or was not available to be seen. If he could

be seen at Gener ral Sessions Court, he certainly would be seen on the job b or seen emerging from his home. No inquiry was made e with regard to this.

THE COURT: I think that might raise a serious question if Sergea ant Fallin took the witness to Bailey's home, and when a single individual emerged from the single home that could be validly claimed to be in violation of the due process under Stovall.

MR. STANFORD: It could be if that were the circumstances—the circumstances were such as have been pointed. However, at the particular time there was no determination as to whether or not he could be viewed in a true selection. As a matter of fact, he could, he was working on the Eastley House which was a gigantic job, and there were as many people on that house as there were in General Sessions Court on that day.

[fol. 142] THE COURT: Well, all I am concerned about was what was done, not what might have been done. What was done in violation of the due process under Stovall.

MR. STANFORD: Your Honor, I feel there is a doctrine which we have all heard about that was passed, the fruits of the poison of the tree, and I believe by showing this photograph first when the man was available, and this may be what might be called sewing the seed for the poisonn fruit.

THE COURT: I think if we pursue this subject, we will arrive at a conclusion. We have come to a point we have to have the criminal trial, if I understand your position.

MR. ROSEN: I disagree with you.

THE COURT: All right.

MR. STANFORD: One other thing for the record, when I was inquiring of Mrs. Apple and the Court sustained the U. S. Attorney's objection and thereafter I ceased the line of questioning after he again objected, I just want the record to reflect that I did not voluntarily terminate the line of questioning, but in accordance with the Court's ruling. I think I may have said something which could be taken otherwise.

THE COURT: All right, sir.

* * * *

[fol. 158] THE COURT: You may proceed.

MR. SEPENUK: Ruby Paugh.

Whereupon,

RUBY HELEN PAUGH

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q State your name and address, please?

A Mrs. Ruby Paugh, 5419 Macbeth, Hyattsville, Maryland.

Q What is your occupation?

A A bank teller.

Q What bank?

A American Securities & Trust Company, East Capitol Street Office.

Q Where is that located?

A 9th and East Capitol Street.

Q And I will direct your attention to August 26th, 1965, were you a teller at the bank at that time?

A Yes, sir.

* * * *

[fol. 158] Mrs. Paugh, tell us what happened at that time?

A At approximately 10:15, this young man came into the bank and up to the center of the lobby waving a gun, telling everybody not to move. The new account-clerk-receptionist-secretary was on the telephone and he went over to her desk which is the first desk on the lay-out there and commanded her to put the receiver down on the telephone. This he did twice.

In a few seconds, apparently a few seconds, there was a figure that came in running through the lobby around into the gate behind the tellers' cages and mine being

the first cage, he came around to my right, and my working drawer with the currency was opened, and with the paper bag he scoped up all he could get quickly and then he went into Mrs. Major's cage which was the next one next to mine. He did the same with her, and he immediately ran back out and he was the first out through the door, and the one with the gun backed up to the door and went out last.

[fol. 159] Q How much money was taken from your cage, from you, Mrs. Paugh?

A $1,981.00.

Q Now, Mrs. Paugh, the man that you first described, the man that waved the gun around and made the statement that you say, I want you to look around the Courtroom, Mrs. Paugh, and tell us whether or not that man is present in the Courtroom? Just look around and tell us if that man is here?

A I cannot be sure if he is here.

Q Can you identify that man who walked in the bank, the man you described?

A Not definitely.

Q Can you make any kind of an identification?

MR. ROSEN: Objection, Your Honor.

THE COURT: Counsel come to the Bench, please.

AT THE BENCH:

MR. ROSEN: Well, as the Court knows, the key issue is identification.

THE COURT: Yes.

MR. ROSEN: Twice he asked if she could make an identification, and she said, "No," and I don't think the Government should lead the witness or try to play games [fol. 160] with her to try to evoke an identification that she stated twice she cannot make. I think it is clear and unequivocal she can't identify anybody. If he wants a description of a person, for example, weight, height, and whatnot, I have no objection. She said twice unequivocally she cannot say when she looked, and I don't think further probing or leading of the witness—

MR. SEPENUK: I believe she said she could not definitely identify the person. I asked her could she make any kind of identification, and that is the question that remains unanswered.

THE COURT: I will permit that.
MR. ROSEN: All right.

IN OPEN COURT:

BY MR. SEPENUK:

Q Mrs. Paugh, the question was, I want you to look around the Courtroom and tell us whether or not you can make any kind of identification of the man who waved the gun around in the bank?
A I can make no definite identification.
Q You stated that.
A Other than the fact there is a young man that is here that looks similar to the one in the lobby.
[fol. 161] Q Would you kindly point out that person?
A This young man right here at the end of the table (indicating).
MR. SEPENUK: Would the record reflect Mr. Paugh pointed to the defendant Ash.
THE COURT: How is he dressed, Mrs. Paugh? How is he clothed? What clothes does he have on this afternoon, how is he dressed now?
THE WITNESS: Right now?
THE COURT: You can look back at him.
THE WITNESS: How is he dressed?
THE COURT: What kind of a shirt, coat?
THE WITNESS: He is wearing a white shirt, a necktie, a sport coat, jacket I suppose.
THE COURT: What color is the coat?
THE WITNESS: The coat is tan, khaki.
THE COURT: Yes, sir, the record will reflect the identification as testified to by the witness.

BY MR. SEPENUK:

Q How long did this process take, Mrs. Paugh? How long did the robbery last, give us your best recollection from the time you first noticed—by the way, I would [fol. 162] like you to do one thing. Would you kindly come down to this diagram and make an "X" at the point where you first noticed the first robber come in, just make an "X" where he was standing when you first noticed him?

A (Indicating.)

Q Thank you.

I am sorry, did you give your best estimate of the time this robbery, from the time you first noticed that person?

A I would say approximately three minutes.

Q During that three minutes, what were you doing?

A I was sitting there petrified.

Q Were you sitting or standing, were you sitting?

A I was sitting.

Q What portion of those three minutes, after you first noticed the gentleman you mentioned, after you first noticed him, what portion of any of those three minutes did you look at him?

A Well, I would say constantly, because I didn't look at the young man on the right who was taking the money.

Q You didn't look, you say, at the young man on the right?

A No, sir.

[fol. 163] Q Is it fair to say you cannot make no identification of who that man might be?

A No, I cannot.

* * * *

[fol. 166] Q As I understand, you say someone came in waving a gun saying that nobody move or a robbery or words to that effect.

Now, at that time, this person, did he have anything over his face?

A No, sir, he had a mask such as a woman's stocking.

[fol. 167] Q Was it over his whole face?

A I don't recall. I think that it came down to beneath his nose, that I am not sure. I think, as I recall, that is where it was.

Q All right. Were there any holes for his eyes so that he could see?

A Yes, I guess there must have been holes for his eyes. I don't remember that.

Q All right. Can you tell us what he was wearing?

A There was one young man who was wearing a sport shirt. I am not sure which one; I don't remember. I think it was the one in the lobby, the one with the gun.

Q Was that the one who came in first?
A Yes, sir.
Q Did this individual who came in first ever point the gun at you personally?
A Well, he pointed it at everybody, he was waving it.
Q Was he waving it over his head?
A No, sir. He was waving it over his head he was waving like that (indicating).
Q Waving like that (indicating)?
A Yes.
[fol. 168] Q Did he have a mask on his face, and you could not identify his face, is that so?
A That is correct.
Q Were there any features that you could identify either on his face or anything you could make out?
A No, sir.
Q Let me ask you, are you prepared to tell us with certainty, with absolute certainty that the man you pointed out is the same one you saw in the bank that day?
A No, sir, I cannot say.
Q You mean you are not sure of that except for that, is that?
A No, sir, I am not sure.
Q Can you tell us any description of the person?
A He was tall, I would say 6—maybe 6 feet—
Q Was there—I am sorry.
A 6 feet, I would say, approximately.
Q Was he stout or stocky?
A He was thin.
Q Was there anything unusual about his appearance, such as build or height or anything that might stand out in your mind that you could remember?
[fol. 169] A No, sir, outside of his excitement, he was very excited and nervous, but nothing in his appearance was unusual that I can recall.

* * * *

[fol. 170]

REDIRECT EXAMINATION

BY MR. SEPENUK:

Q You could not identify the second man. I ask you, can you give us any description whatever of that second man?

A Not too much. I only saw a fleeting instance as he came around to my left and behind me.

Q With that understanding of that limitation, would you kindly give us the description as you remember it?

MR. STANFORD: Your Honor, may we approach the Bench?

THE COURT: Yes, sir.

[fol. 171] AT THE BENCH:

MR. STANFORD: Your Honor, I feel this questioning in this area is objectionable to this extent, prior to trial in your hearing, it was not indicated that this woman would not make any in-court identification. That was my implication. I presume, since there was no foundation put forth by the Government to indicate that she was going to do so, I feel that even a fragmentary identification is violatable of that position.

MR. SEPENUK: Certainly she is not to make an in-court identification, I just want to ask her to give us a description. I would like to create the person under the circumstances. If she is going to give a fragmentary identification for a few feet, we feel that when the testimony, that when Mrs. Apple testifies, we do suspect her to make an identification. We are not asking her to make an in-court identification, we want the woman's recollection. It is a scanty one actually.

THE COURT: What do you expect her to testify?

MR. SEPENUK: If it was a negro male, I believe, approximately the same height or an inch or so, dark complexion. It is right in the Jenks Act statement that she testified to. That is all I know what is in the Jenks Act statement. She might not even remember that, I don't know.

[fol. 172] THE COURT: I will let you ask the question.

IN OPEN COURT:

BY MR. SEPENUK:

Q Mrs. Paugh, just give us your best recollection as to the general appearance of that second man?

A Well, I can't really describe much about him, outside of the fact he was larger in build than the first one. Other than that I don't—there is nothing I can describe about him.

Q Do you recall whether he was a Caucasian or a negro?

A I would say he was negro, for the fleeting instance I saw him, he was negro in the instance that I saw him.

MR. SEPENUK: Thank you. That is all I have.

* * * *

[fol. 173] MR. SEPENUK: Mrs. Jean Major, please.

THE COURT: You may proceed.

Whereupon,

JEAN MAJOR

was called as a witness, and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q State your name and address, please?

A Mrs. Major, I live in Maryland.

Q Your first name is what?

A Jean.

Q Would you give us your precise address, Mrs. Major?

A 4404 Summit Place, Silver Spring, Maryland.

Q What is your occupation?

A Bank teller.

Q Speak up.

A Bank teller.

Q At what bank?
A American Securities & Trust.
Q What branch?
A East Capitol Street branch.
[fol. 174] Q Directing your attention to August 26, 1965, about 10:15 a.m., were you duty in the bank at that time?
A Yes, sir.
Q Could you tell us where you happened to be on that —by the way, we have identified here what is a sketch of the inside of the bank, and you have examined this before at my request, have you?
A Yes, sir.
Q Would you come down to the sketch, please, and just put with an "M" the first letter of your last name where you—where you were at about 10:15 a.m. on the morning of August 26, 1965?
A (Indicating).
Q Would you kindly return to the stand.
Directing your attention to that day, Mrs. Major, at 10:15, August 26, 1965, tell us what happened?
A I was at my cage, we call them, making out a payroll with my back towards the front door. My mind was —my full attention was on the payroll until all of a sudden I heard a loud voice, someone stating, don't move. I turned around to see what was going on. The rest of the conversation I am not too sure. I remember him telling us to put the telephone down.
[fol. 175] Q The bandit said "Don't move."?
A "Don't move."
Q And then what did he do?
A He was waving a gun at us, walking up and down the lobby of the bank.
Q Did you see him doing this?
A Yes.
Q Then what happened?
A A second man came around the back of our cages and took money from two tellers, Mrs. Paugh's and mine.
Q Was money taken from you?
A Yes.
Q How much money?
A $1,848.00.

Q By the second man?
A By the second man.
Q Then what happened?
A He walked out to the third cage, the second man, and that man was lying on the floor, possibly in a faint, we don't know, and the second man, when he noticed this, turned around and walked out from behind the cage, joining the first man, and they both left the bank.
[fol. 176] Q How long did this whole process take, from the first time you first noticed the man until the two robbers left the bank?
A It seemed like a long time, but I wouldn't say more than—I would suppose four, maybe five minutes.
Q By the way, where was the first man standing when you first noticed him? Can you possibly point it out on the diagram?
A When I first noticed him, he was coming around behind us, but I hadn't notice him prior to this time.
Q All right. Why don't you come down here and show us where he was when you first noticed him?
THE COURT: Is this a question as to the first man or the second man?
MR. SEPENUK: I am sorry, Your Honor, the first man, the man with the gun. I should have amended the question.
THE WITNESS: The first man with the gun would have been in this area somewhere when I first noticed him (indicating.)

BY MR. SEPENUK:

Q Is it fair to say it was in the vicinity of that "X"?
A Yes.
Q Is that correct?
[fol. 177] A Yes.
Q Would you kindly go back to the witness stand.
From the time you first noticed that first man, the man with the gun, until the two men left the bank, what portion, if any, of that time did you look at that first man?
A Most all the time.
Q Now, I want you to look around the Courtroom, Mrs. Major, and tell us whether or not that man that you described is or is not in this Courtroom?

A I believe he is.
Q Would you kindly state who it is?
A It is this gentleman, the first one (indicating).
Q Is it the first man to the left here?
A Yes.

MR. SEPENUK: May the record reflect Mrs. Major identified the Defendant Ash?

THE COURT: Yes.

BY MR. SEPENUK:

Q Now, what kind of a look, if at all, did you get at this second man?
A Not much at all.
Q Did you see him for any portion of the time?
[fol. 178] A I just looked at him long enough to see that he didn't have a gun in his hand.
Q Did he have anything in his hand?
A Only a big bag or some sore of a recepticle for the money he had, as far as I can remember.
Q All right. In the look that you had, would you kindly give us your best recollection of what he looked like?
A This would be very difficult, because it was such a slight look, the man was shorter, the second man was shorter than the first, more muscular in his build. I can't give you an estimate as to his weight, his age, because it was such a slight look that I would hesitate to go any further than that.
Q Do you recall whether or not he was a Caucasian or a negro?
A He was a negro, they were both negro.

* * * *

[fol. 179]

CROSS EXAMINATION

BY MR. ROSEN:

Q How long have you been a teller at the bank?
A Fifteen years.
Q Now, you were a teller on that day, that robbery?
A I am sorry.
Q You were working as a teller during the robbery?

A Yes.

Q What time did the robbery take place, if you recall?

A Right now I don't remember the exact time. It was in the morning.

[fol. 180] Q All right. Do you remember the day of the week?

A No.

Q Now, I believe you said when the first man came in, "My back was turned," is that correct?

A My back was turned.

Q All right. You then turned around when you heard someone say words to the effect, "This is a stickup" or "This is a robbery," or words to that effect?

A Something—I said when I heard him say, "Don't move," then I turned—

Q When you heard him say, "Don't move"?

A To that effect.

Q To that effect?

A Yes.

Q Did you turn around?

A I turned to face him.

Q Did you raise your hands?

A No, I was told not to do that, and I didn't.

Q All right. Now, when you turned around, were you facing directly at the person?

A Yes, I was a short distance from him.

Q You were a short distance from him.

[fol. 181] Approximately how far would you say?

A Closer than you.

Q This distance would be accurate?

A That would be closer.

MR. ROSEN: About six feet, Your Honor?

THE COURT: The distance between you and the witness?

MR. ROSEN: Ten feet?

THE COURT: I would say it is more than ten feet, approximately 12 feet.

MR. ROSEN: Twelve feet.

THE COURT: Can we agree on that, gentlemen?

MR. ROSEN: Twelve feet?

MR. SEPENUK: Oh, yes, I would say the distance between you and the witness—

MR. ROSEN: About twelve feet, Your Honor.

BY MR. ROSEN:

Q Now, at that time were you looking at him—looking right at his face?

A Looking right at him, at his whole being.

Q All right. Was there anything unusual about his appearance?

A He had a stocking cap over his face.

[fol. 183] Q Is that a lady's stocking?

A Yes.

Q In other words, over his whole face?

A I believe down to here, right under his nose (indicating).

Q You couldn't see this part, is that correct, above?

A Above that.

Q You couldn't make out his face, is that correct?

A That is correct.

Q Was there anything distinctive about his appearance, his height, his weight, his build?

A Yes, I noticed several things at the time. I noticed that he was a light-skinned negro, I noticed he was about six feet or in that neighborhood, I noticed that he was slender, I noticed he was very neatly dressed. These things we are trained to notice in the event, notice all the little details, and we wrote them down immediately following the robbery.

Q All right. I believe a moment ago you told us in response to the prosecutor's question, you believed the man you pointed out in court, you believed to be the same man, is that correct?

A I believed to be the same man.

[fol. 183] Q All right. Are you prepared to tell us with absolute certainty that is the same man, the man you saw in the bank that day is the same man you pointed out today?

A I cannot say with absolute certainty, no.

Q You have some doubt in your mind?

A I have no doubt in my mind, but I cannot say with absolute certainty.

Q All right. Now, you recall what this man was wearing?

A I believe it to be a light tan or a brown shirt, a light shade of color. I don't remember his trousers except I noticed that he was extremely neat in his appearance.

Q Were you able to see which way he went?

A Not once he left the bank door, no, not once he went out of the lobby.

Q While he was in the bank, did he do anything or act in any way that attracted your attention other than point the gun the way—

A He seemed quite excited. He didn't remain in one spot, he moved, as you see on the diagram, up through the whole area that says "Lobby", and he had a gun and he was constantly clicking until we were—we expected at any minute for the gun to go off.

[fol. 184] Q By "clicking," is that clicking the hammer?

A I am not familiar enough to know, of guns to know what he was clicking but there was a clicking noise that I heard.

Q Let me ask you this: Did he ever point the gun directly at you?

A Oh, yes.

Q Like that (indicating)?

A Yes.

Q All right. Did he point the gun in any other manner?

A Yes, he took his turn around the room with everybody.

Q I see.

MR. ROSEN: I have nothing further, Your Honor.

THE COURT: Mr. Stanford?

MR. STANFORD: I have no questions.

THE COURT: Anything else?

MR. SEPENUK: No, sir.

THE COURT: Thank you, you may step down. May the witness be excused?

MR. ROSEN: No objection.

MR. STANFORD: No objection.

THE COURT: You may be excused or remain in the Courtroom, whichever you wish.

(The witness was excused.)

[fol. 185] MR. SEPENUK: Joseph E. Taylor.

Whereupon,

JOSEPH E. TAYLOR

was called as a witness, and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q Mr. Taylor, state your name and address, please?

A Joseph E. Taylor, 15-9th Street, N. E., Washington, D. C.

Q What is your occupation, sir?

A U. S. Post Office.

Q You are an employee of the United States Post Office?

A Yes.

Q And where do you do your banking?

A American Securities & Trust.

Q Could you speak a little louder.

At what branch of the American Securities & Trust?

A 9th and East Capitol Street, Northeast.

Q On August 26, 1965, were you in the bank at that time?

A Yes, I was.

[fol. 186] Q Directing your attention to about 10:15 a.m. on that day, would you please tell us what happened?

A I was talking to Mr. Burton who is one of the tellers and in the course of our conversation, the door opened, I glanced to my left and saw a man come in and then we resumed our conversation.

Momentarily, thereafter, he, the man, said, "Don't move, this is a holdup." And what transpired after that was rather difficult, you know, to recall.

Q Could you try to recall? Do you have any recollection of what transpired after this?

A The gentleman moved around in the bank and—he left out and appeared to drop a bullet, I heard an object fall on the floor, and I saw him reach down, just out of the corner of my eye.

Q Is this the gentleman who you previously described?

A Yes.

Q After he said—did you say, "Don't move"—you give the testimony, what did he say to the best of your recollection?

A That is all I can recall, he said, "Don't move," and I stood still.

[fol. 187] Q For how long a period of time did you look at this person?

A Just a matter of seconds.

Q By the way, would you please come to this diagram, Mr. Taylor, and at my request, you have looked at this, have you not?

A Yes.

Q Would you mark with a "T", the first letter of your last name, where you were standing when you first noticed this gentleman you described? Perhaps you can do it—

A (Indicating.)

Q While you are there, where was the man standing or where was he when you first noticed him?

A I was standing here, just to my left—right.

Q Would you put a circle, a small circle, for indicating that?

A (Indicating.)

Q Stand back just one second.

Is it fair to say then that you were standing where it was marked "T" and the person you described was standing were it was marked "O" when you first noticed him?

A Yes.

[fol. 188] Q And in terms of inches or feet, how far away were you from him?

A Very close. I guess about maybe from—about that distance (indicating).

Q All right. Would you look around the Courtroom, Mr. Taylor, and tell us whether or not the person you described is present in this Courtroom?

A The first man on the end looks sort of like the man that I saw coming in.

Q Which end, the left end?

A The left.

Q The left.

MR. SEPENUK: May the record reflect Mr. Taylor pointed out the defendant Ash.

THE COURT: Yes.

BY MR. SEPENUK:

Q Was that gentleman that you described—did he have anything with him when you looked at him?

A No.

Q Did you—excuse me?

A Not that I noticed.

Q And was there one man or more than one man involved in this?

[fol. 189] A I only had a glimpse of one.

MR. SEPENUK: I believe that is all, Your Honor.

THE COURT: Mr. Rosen.

MR. ROSEN: May I have the Court's indulgence?

THE COURT: Yes, sir.

MR. STANFORD: I will ask Mr. Taylor one or two questions.

THE COURT: All right, sir.

CROSS EXAMINATION

BY MR. STANFORD:

Q You have indicated that Charles Ash, the defendant at this end, and not John Bailey, is that correct?

A Yes, sir.

MR. STANFORD: I have no other questions.

MR. SEPENUK: That is all I have.

THE COURT: Mr. Rosen?

MR. SEPENUK: Thank you, Mr. Taylor.

THE COURT: Did you have any questions?

MR. SEPENUK: I am sorry, excuse me, I understood there were no further questions.

THE COURT: You may proceed, Mr. Rosen.

MR. ROSEN: Thank you.

[fol. 190]

CROSS EXAMINATION

BY MR. ROSEN:

Q Mr. Taylor, I believe you said you work in the Post Office?

A Yes, sir.

Q How long have you been working in the Post Office?

A About 18 months.

Q Where were you employed the day of the offense?

A St. Matthews C.M.E. Church, Cedar Heights, Maryland.

Q In what capacity?

A Pastor.

Q And you left this job, is that correct, to work in the Post Office?

A Yes, sir.

Q Now, you were a regular depositor at the bank, is that correct?

A I beg your pardon?

Q You are a regular depositor at the bank?

A Yes, sir.

Q Now, I understand in your testimony, I believe you said your back was to the front door when a man came in and said, "Nobody move," or words to that effect?

[fol. 191] A No, I was facing the cage.

Q Were you facing the cage over here, is that correct (indicating)?

A Yes.

Q In other words, your side was to the front door?
A Yes.
Q All right. Were you dealing with Mrs. Major or Mrs. Paugh?
A Mr. Burton.
Q Mr. Burton is another teller?
A Yes.
Q All right. What would you estimate the distance from the front door to the cage where you were?
A Four or five feet, I guess.
Q Four or five feet. At that time you immedaitely turned and faced the door.
A I just looked like this (indicating), and then we resumed our conversation.
Q You didn't—weren't—you were afraid?
A I beg your pardon?
Q Did you feel frightened or afraid for someone?
A He had nothing when I looked. You see, he spoke after he came and stood behind me.
[fol. 192] Q When he came in, did he do anything that attracted your attention?
A No, sir.
Q That you looked at him?
A No, sir.
Q All right. When you turned as you described, as you looked at the man, did you see his full face?
A When was that? You mean when he first came in?
Q First off, when he first came in?
A When he first came in, yes.
Q You were able to make out his full features?
A Not fully. That is the reason I said he looks like —I was not certain.
Q All right. Did he have a mask on?
A Not when I saw him.
Q Did you notice whether he had a mustache or anything like that?
A I believe so.
Q Did he wear glasses?
A No.
Q Do you recall the clothing he was wearing?
A Seemed like a dirty white shirt, that's about it.

[fol. 193] Q Did you notice anything else about him?
A I can't recall anything else.
Q I sorry?
A No, I can't recall anything else.
Q Now, you say he came behind you, is that correct?
A Yes.
Q Then he said, "Nobody move," or "This is a robbery," or words to that effect?
A Yes.
Q At that time you turned around to look at his face?
A No, I didn't.
Q Now, after those words were said, "This is a robbery," or words to that effect, until that man left the bank, at any time did you turn around?
A No.
Q To look at his face?
A No.
Q Do you recall if he had a mask on?
A No.
Q The only identification you have of him, you glanced, as you described, as the man came in?
A Yes.
[fol. 194] Q Can you recall if there was anything that attracted your attention to look in that direction?
A No, other than—I was standing talking and no one else other than one other person was there, and I guess from force of habit or instinct or something.
Q Are you prepared to tell us with absolute certainty the man you pointed out is the same man who was in the bank that morning?
A No, I cannot.
Q You just said that—
A I said it looks like him.
Q You have some reservations?
A I cannot be certain that he is.
MR. ROSEN: Nothing further.
MR. SEPENUK: That is all I have, Your Honor.
THE COURT: Any further questions, gentlemen?
MR. STANFORD: No, Your Honor.
MR. ROSEN: No, Your Honor.
THE COURT: May the witness be excused.

MR. ROSEN: No objection.

THE COURT: You may be excused or you may remain in the Court, whatever you prefer.

(The witness was excused.)

[fol. 195] MR. SEPENUK: Mrs. Betty Apple.

Whereupon,

BETTY APPLE

was called as a witness and, after being first duly sworn, was examined and testified as wollows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q State your name and address, please.

A Mrs. William Apple, 318-D Street, Northeast.

Q And what is your occupation?

A Cocktail waitress.

Q I am going to call your attention to April 26, 1965, do you recall that being the day of the robbery of the American Securities & Trust—

MR. ROSEN: Objection, Your Honor. I would ask the witness testify and not the prosecutor.

MR. SEPENUK: All right, I will rephrase it.

THE COURT: This is a preliminary question, Mr. Rosen. Your objection is overruled.

MR. STANFORD: Just for the record, I believe he said April, you meant August?

MR. SEPENUK: August. I will rephrase it.

[fol. 196] BY MR. SEPENUK:

Q Mrs. Apple, directing your attention to August 26, 1965, at about 10:15 a.m., will you please tell us what you were doing at that time?

A I was sitting in my husband's car on the side of the East Capitol Branch.

Q All right. At my request, Mrs. Apple, have you examined this diagram? Remember I asked you to look at it?

A Yes.

Q Would you just come up here, please, and put an "X" where you were sitting in that car?

I might say this is East Capitol Street, and this is northeast 9th, just put an "X" where you were sitting in the car. Make it a bit darker, please.

We do have an "X" and I will tell you, put an "A", in other words, the first initial of your last name.

A (Indicating.)

Q Would you go back to the stand, please.

Where were you sitting in the car?

A I was on the right hand side.

Q Where was it—who were you with at that time?

A I was with nobody at the present moment.

[fol. 197] Q All right. Who were you with?

A My husband.

Q Where was he?

A He was inside the bank.

Q Again directing your attention to 10:15 a.m., tell us in your own words what you observed, what happened?

A I was sitting in my husband's car at the present moment, and all of a sudden I see a man run out with a paper bag. I said, it is a bank robbery, and then I saw a second fellow run out behind him.

Q Did you observe anything else?

A Then all of a sudden I see the police drive up.

Q All right. I want you to look around the Courtroom, Mrs. Apple, you described—you told us about two men, and I want you to look around the Courtroom and tell us whether or not either or both of those gentlemen are present in the Courtroom?

A Yes, I believe they are.

Q Will you kindly point them out?

A (Indicating)

Q All right, you pointed—I wonder if we might not perhaps ask the witness to come down, Your Honor. I [fol. 198] don't want to make any suggestions to her.

THE COURT: Yes, she may step down and indicate which one you had in mind.

MR. SEPENUK: Step down Mrs. Apple.

Why don't you just walk over, if you will, and point the gentleman out?

THE WITNESS: (Indicating.)

MR. SEPENUK: All right, is that all right?

THE COURT: What is that witness wearing, what kind of clothes does he have on? What colored coat?

THE WITNESS: It's kind of a cream color coat.

THE COURT: All right.

BY MR. SEPENUK:

Q And the other gentleman, if you recognize him, if you please, just point him out?

A I would say with the dark suit.

Q A dark suit.

THE COURT: Where is he seated? At the table?

THE WITNESS: He is seated at the other end of the table.

THE COURT: All right.

MR. SEPENUK: Thank you very much.

[fol. 199] May the record reflect Mrs. Apple pointed to the defendants, Mr. Ash and Mr. Bailey.

THE COURT: Yes.

MR. SEPENUK: Thank you, Mrs. Apple.

CROSS EXAMINATION

BY MR. STANFORD:

Q Mrs. Apple, did there come a time after this occurence on August 26, 1965, when you were shown photographs by the police department or by Agent Markowvich of the FBI?

A Yes.

Q When was that?

A I can't recall just when it was.

Q Was it in August of 1965 or was it September, can you give us some idea?

A No, I can't quite recall at all.

Q Was it soon after the occurrence?

A Yes, it was.

Q How soon?

A Well, I can't say just how soon, because it has been so long ago.

Q It has been longer ago than that?

A Yes. Then entire —

[fol. 200] Q Your memory has dimmed somewhat as a result of time?

A Yes, it has.

Q Now, may I suggest to you that you were shown photographs some five months or more after this occurrence, is that true?

A Yes.

Q Was it in January of 1966?

A I don't recall when it was.

Q At that time were you shown a photo of a man and you say you could not be sure if this was the man, one of the people at the bank robbery from a group of five?

A That is right.

Q You told that to Agent Markowvich of the FBI?

A Yes, I did.

Q Thereafter, were you shown on another occasion within one week or ten days later the same photo by Agent Markowvich of the FBI?

A Yes, I believe I did.

Q Thereafter, about two weeks later, were you then —have an opportunity to see a person whom you identified as in some way in connection with this bank robbery?

A Yes, I believe I did.

[fol. 201] Q In preparation for this case yesterday or the day before, did you have an opportunity to see a picture, another picture of a man, and did you tell the FBI Agent, two agents, Markowvich and Berry that you could not identify that as being one of the men?

A No, I did not.

Q I see. Did you on this day, I believe it was two days ago, in preparation of this trial, did you pick out from the group of five photographs one photograph which you said was one of the men, but only picked out one photograph?

A That is right.

MR. STANFORD: May I have them?
THE COURT: Counsel come to the Bench, please?

AT THE BENCH:

THE COURT: The colored photographs were marked for the pretrial hearing. Do you wish them to bear a trial number now?
MR. STANFORD: Your Honor—
MR. ROSEN: I think I would appreciate that.
THE COURT: All right.
MR. STANFORD: I think they should. I may not use all of them. I don't know how long the Jury will go—
[fol. 202] I want specifically, Mr. Clerk, the ones of Charles Ash.
You may object to this, but I wish to show this was the man she identified.
THE COURT: While they are being marked and you gentlemen sharpening your wits for further conflict, I am going to excuse the Jury so they may take their mid-afternoon recess.

IN OPEN COURT:

THE COURT: Ladies and gentlemen, we will take a ten minute recess at this point.

(Short recess.)

THE DEPUTY CLERK: Defendant Bailey's Exhibits 1 through 5 marked for identification.

(Defendant Bailey's Exhibits 1 through 5 marked for identification.)

MR. STANFORD: Your Honor, may we approach the Bench with regard to these pictures?
THE COURT: All right.

AT THE BENCH:

MR. STANFORD: I want to pull David Shine and crop part of the photographs with tape especially with regard to Ash, the numbers with regard to the numbers, it won't take too long. I won't object to accomplish-

[fol. 208] ing this by putting an exhibit stamp even though it is blank. It may be sufficient to cover the entire area.

MR. SEPENUK: What exhibits are they?

MR. STANFORD: They are exhibits Nos. 5 and 4.

THE COURT: It is not a bad idea if you can do that. I think they should be obscured.

MR. ROSEN: Otherwise you are going to have a Barnes problem.

THE COURT: You won't have a Barnes problem with these defendants. You fellows have a wide range.

MR. ROSEN: That is true. I say the Barnes problem—

THE COURT: The District Attorney should have a Barnes problem.

MR. ROSEN: We have a scale back, equal back some way.

THE COURT: I think it is perfectly all right the way it has been.

That is perfectly all right. You need not scratch that thing.

MR. STANFORD: That is all right.

MR. SEPENUK: May I see it?

THE COURT: I think it is apparent if you look at it you did it twice, put the same number on that.

[fol. 204] MR. ROSEN: Your Honor, before the Jury comes in, I would like to know why they are being shown to Mrs. Apple.

MR. STANFORD: I make that proffer, Your Honor, I wish to show that she was shown pictures on several occasions prior to her identification of an individual as one of those involved in the robbery, and then in trial preparation, immediately before trial she was shown a picture of a man who purports to be John Bailey and was unable to identify from that picture.

THE COURT: You may show them.

MR. SEPENUK: I might say this, Your Honor, this allows us to bring out she picked out Mr. Bailey.

THE COURT: What is this question about?

MR. SEPENUK: In the corridor of the Court of General Sessions.

THE COURT: I won't let you go into that unless counsel has gone into the question of the adequacy of the identification.

MR. ROSEN: I would have no objection provided it is brought out she did not identify Ash in the Court of General Sessions, just Mr. Bailey.

MR. SEPENUK: May I go into that, Your Honor.

[fol. 205] THE COURT: Yes.

MR. STANFORD: Your Honor, for the record, I object to that.

MR. ROSEN: I won't say anything.

MR. STANFORD: You can't.

THE COURT: I won't let him go into the question, because once you have gone into that, he can ask any question.

I am sure you gentlemen observed Mr. Sepenuk does not wait for time and knows what he is doing. That isn't true of all our young men.

MR. SEPENUK: Thank you. At the risk to have I hope to have this chance, I don't know what Mrs. Apple is going to testify to, but if she is unable to recall the identification of Bailey, I would be entitled to put either Sergeant Fallin or the FBI Agent on to testify to her identification.

THE COURT: Yes. Don't let us prolong it. I think she is not too sure of herself as a witness. She is a nervois woman.

MR. SEPENUK: That is right.

MR. ROSEN: I think she is afraid more than anything which is understandable.

MR. STANFORD: All right.

* * * *

[fol. 208] BY MR. STANFORD:

Q To recapitulate, Mrs. Apple, you told us before we had the break, that you had not—that you saw photos sometime in early 1966, and then after you were shown them by the police officer, you were again—saw photos shown to you by police officers—by lieutenants—by special agent Markowvich of the FBI, then you identified a man thereafter in person, is that correct?

[fol. 209] A Yes.

Q But this all occurred some considerable time after the event of August 26, 1965?

A Yes.

Q Then you indicated to us that in trial preparations, a couple of days ago, in Mr. Sepenuk's office, with the FBI Agents present, you looked at five photographs, five colored photographs as opposed to black and white photographs, and from that group of five, you identified one person as being the person you identified who was involved in the holdup of August 26?

MR. SEPENUK: Your Honor, just to save confusion, that was in the Savarin Restaurant at Union Station, not the United States Attorney's office.

MR. STANFORD: All right.

THE COURT: Fine.

BY MR. STANFORD:

Q This occurred a couple of days ago in the Savarin Restaurant where you are employed?

A Yes, it did.

Q I show you what has been marked Defendant's Exhibit No. 5, Mrs. Apple, is this photograph of the man you identified as being involved in the robbery?

[fol. 210] A Yes, it is.

Q I see.

MR. STANFORD: I would ask that that be admitted into evidence and shown to the Jury at this time, Your Honor.

THE COURT: Counsel come to the Bench, please.

AT THE BENCH:

THE COURT: I don't know the reason you are offering this exhibit during this portion of the case, you are waiving your right to a directed verdict if you do.

MR. ROSEN: That is correct.

MR. STANFORD: I withdraw that, Your Honor.

THE COURT: All right, sir.

IN OPEN COURT:

MR. STANFORD: Your Honor, I will not ask that this be moved into evidence at this time.

THE COURT: All right, sir.

BY MR. STANFORD:

Q I would ask you, Mrs. Apple, if you were shown these others photographs which are marked Defendant's Exhibit No. 4, Defendant's Exhibit No. 3, Defendant's Exhibit No. 2, and 1?

MR. ROSEN: Your Honor, may we approach the Bench?

THE COURT: Yes, sir.,

[fol. 211] AT THE BENCH:

MR. ROSEN: Your Honor, I am going to object to Mr. Standford's procedure. I don't know whether he is sandbagging his client, the person he shows, and he asks to pick out Bailey or them. It is highly irregular for Mr. Stanford to do this, and I am going to object to it.

THE COURT: I don't know what counsel is doing, all I know is that he is following a procedure that was followed in the Savarin Restaurant a couple of days ago.

MR. ROSEN: I have this objection. If he is going to make the proffer to show the pictures of Ash, and it was Bailey, pick out Ash and Bailey, then I have to object. If he does go into it, I am going to object. Now, he has shown four and he asked can you pick out the—

MR. STANFORD: No, I am not going to do that, I am going to ask if she saw the other photographs, four photographs, and I am not going to ask her anything further after that on this line.

THE COURT: All right, I don't seen anything objectionable there.

MR. ROSEN: All right.

IN OPEN COURT:

[fol. 212] BY MR. STANFORD:

Q Mrs. Apple, when Special Agent Markowvich showed you five photographs a couple of days ago at the Savarin Restaurant—

MR. SEPENUK: Excuse me, we are talking about Special Agent Berry, not Special Agent Markowvich.

THE COURT: Thank you.

BY MR. STANFORD:

Q When you were shown five photographs by Special Agent Berry, with the other four photographs in addition to the one you have already identified?

A Yes.

Q Now, Mrs. Apple, on the day this occurred, the day that the bank robbery occurred, you stated you were seated in an automobile, your husband's auttomobile?

A Yes.

Q Where was that in relation to the East Capitol Street Branch of the bank which is 822 East Capitol Street?

A I believe it was parked on the 9th Street side of the street.

Q On the 9th Street side?

A Yes.

Q Let me—I am a little bit confused with that. You were on East Capitol Street?

[fol. 213] A No, we were on 9th Street.

Q You were on 9th Street?

A Yes.

Q Was this around the corner?

A Yes, it was.

Q From what point, is the front entrance visible?

A No, not around the corner.

Q As you were on 9th Street, was your car parked on 9th Street, and you cannot see the front entrance, is that right?

A No, you can't.

Q The first time you saw a man moving around the corner he had a paper bag in his hand?

A Yes.

Q You had—during the time you were seated in your car, you had never seen this man before that, is that correct, while you were seated in the car at that time?

A No, they were parked in front of my husband's restaurant at 723 East Capitol, Southeast.

Q Were you in the car at this time?

A Yes, I was.

Q I see. How long a period of time was this?

A About ten minutes.

[fol. 214] Q I see. Now, you had—you said you saw somebody in a car near your husband's restaurant?

A Yes.

Q What kind of car was that?

A It was a cream colored Pontiac convertible.

Q And was this car parked ahead of you or behind you?

A This car was parked in front of us.

Q How many people were in that car?

A Three.

Q Three people. Was this car out of your sight after you were behind the car at that time?

A Yes, it pulled out when we did.

Q So you saw three men in a 1963 cream colored convertible Pontiac?

A Yes.

Q Then this car left?

A Yes.

Q And thereafter you saw a man while you were parked on 9th Street—where on 9th Street, incidentally, were you parked? How far back from the corner?

A Not very far.

Q While you were parked on 9th Street, you saw a man coming around the corner, is that correct?

[fol. 215] A Yes.

Q Now, Mrs. Apple, did you ever have any knowledge of your own personal observation that the man you saw walking or moving around the corner, I think you said running, had been in the bank?

A No, I didn't know for sure.

Q But you had not seen any man, anyone emerge from the bank and you had not seen anyone go into the bank, so you of your own personal knowledge had no awareness of the fact that this person had been in the bank at all, is that correct?

A That is right.

MR. STANFORD: I believe I have no further questions at this time.

THE COURT: Mr. Rosen?

MR. ROSEN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. ROSEN:

Q Mrs. Apple, when did you first learn about the robbery?

A I saw the man running around the corner from the bank and going into the alley way.

Q Now, at that time, you didn't know a robbery took place, is that so?

[fol. 216] A No.

Q Now, when—let me ask you, as I understand your testimony, you were parked approximately over here, is that correct (indicating)?

A That is right.

Q All right. Approximately how far were you, would you say, from the corner of East Capitol Street and 9th Street?

A Not very far, that is all I can say.

Q Would you say twenty or twenty-five feet?

A Yes, around there.

Q Were any cars in front of you?

A No cars in front of us and no cars in back of us.

Q I take it when you said the right side, the passenger side, is that correct?

A Yes.

Q Now, were you facing south, going towards the southeast or were you facing north, going in a north direction of Union Station?

A No, we was coming up from 9th Street.

Q In other words, coming up from Pennsylvania Avenue, is that correct?

A (No response.)

[fol. 217] Q Let me ask you this, which direction does 9th Street run, does it run north or does it run south? In other words, north—

THE COURT: If it runs north, it has to run south, too.

MR. ROSEN: I said north or south.

BY MR. ROSEN:

Q In other words, when you were going—
A We were going towards Pennsylvania Avenue.
Q You were facing south. You say you saw the first man carrying a bag when he came around the corner, is that correct?
A Yes.
Q Also you didn't know there was a robbery?
A At the first moment, I didn't know.
Q All right. You only got a fleeting glipse of that person, isn't that so?
A That is right.
Q You were not able to see his whole face?
A That is right.
Q As he ran past you, did he do anything suspicious?
A No.
Q Approximately how long after the first man did the second man come that way?
[fol. 218] A Oh, less than five minutes.
Q You mean, as I understand your answer, there was approximately five minutes lag between the time the first man came around and the second man, is that correct?
A Yes.
Q Now, also at that time you didn't know there was a robbery, is that correct?
A That is right.
Q Now, as the second man ran up 9th Street, which direction did he go?
A He went through the alley way, too.
Q As he ran past you, you did not see his full face?
A No.
Q Did he have a mask on, did the second man have a stocking mask on?
A No.
Q No mask. Did he carry anything in his hand?
A Not the second man.
Q Did you see any gun exposed?
A No.
Q All right. Did the first man have a stocking mask?
A No.

[fol. 219] Q On either occasion, as these two people ran past you, you did not see their full face?
A Yes.
Q And you only saw at the most was a profile?
A Yes.
Q The right side of their face?
A Yes.
Q All right. Were there any distinguishing marks you might have seen on their face, a scar or a mustache or glasses or anything like that?
A No.
Q Then the identification you made of those two individuals is only the profile, isn't that so?
A That is right.
Q All right. Since that day you have not seen those two individuals, isn't that so?
A Where?
Q Since that day, the robbery, you have not seen those two individuals, isn't that so?
A Yes.
Q All right. This robbery took place in 1965?
A Yes.
[fol. 220] Q And your memory has dimmed since that time?
A Yes, it has.
Q Are you prepared to tell us with absolute certainty the two people who ran past you and you saw their profile are the same two people here?
A I still say so.
Q There is no question in your mind?
A No, there isn't.
Q Now, were there anything about there characteristics that you might recall?
A No, there isn't.
Q There height or weight or anything of that nature?
A Well, their height.
Q Well, tell us about their height?
A They look about the same height, that is what I said.
Q Approximately how tall were they?
A Well, I can't say, that is too long ago to remember.

Q Would you say 5 foot 8?
A I would say around that.
Q Were they stocky, heavy?
A No, not too stocky, no.
Q About 180?
[fol. 221] A How much?
Q About 180 or 170?
A Around there.
Q All right. Did either of them, do you recall, wear glasses?
A No, they didn't wear glasses.
Q Did either of them have a mustache or a Van Dyck?
A I didn't get that close a look.
Q Now let me ask you this: The distance—you estimate the distance that where your car was, where you were sitting in the car, the general area where they ran past you, in other words, was about five feet or more where they ran past you?
A About that, because I was sitting in the car.
Q There was about five feet distance of you, where you were to the path or the tracks they ran by?
A Just about.
Q What was the lighting conditions at that time?
A It was daytime.
Q Bright sun?
A No, it wasn't too bright sun.
Q Now, what kind of car were you sitting in?
A We had a Lincoln Continental.
[fol. 222] Q That has tinted glass, doesn't it?
A Yes, it does.
Q And that sort of reflects the sun, keeps the sun out, doesn't it?
A Yes, it does.
Q And you also had some—distorts a person's appearance that comes towards you, is that so?
A Yes.
Q So you really couldn't see accurately the face that came towards you?
A That is right.
Q Now, as these two people ran past you, did they dilly-dally or stop?

A No, they didn't.

Q Approximately how long would you say it took as they ran past you? In other words, was it a fleeting second, so to speak?

A Yes, it was.

Q Now, after these two people ran in the alley, approximately how long after that did you learn a robbery had taken place?

A The police had already gotten there then and that is when I said to the police, "Please don't link me in."

[fol. 223] Q You identified these two people before. Can you tell us now, which was the first man and which was the second man?

A No, I can't.

Q Was your observation of one man better than the second man? In other words, did you get a better look, would you say in your own mind, of the first man that ran past than the second man who ran past you?

A No.

Q Would the look or the glance, so to speak, be about the same?

A Yes.

MR. ROSEN: May I have the Court's indulgence?

THE COURT: Yes.

MR. ROSEN: Nothing further, Your Honor.

THE COURT: Mr. Sepenuk?

MR. ROSEN: May I have the Court's indulgence?

THE COURT: Yes, sir.

MR. ROSEN: Nothing further, Your Honor.

THE COURT: Mr. Sepenuk?

MR. SEPENUK: I just have a few questions.

THE COURT: All right, you may proceed.

[fol. 224]

REDIRECT EXAMINATION

BY MR. SEPENUK:

Q Mrs. Apple, you mentioned a car was parked in front of a restaurant owned by you and your husband, is that right?

A Yes.

Q Where is the restaurant located?
A 723 East Capitol Street, Southeast.
Q How far is that from the bank?
A One block.
Q Would you describe that car?
A It was a Pontiac convertible.
Q Do you remember what year it was?
A No, I don't.
Q What color was it?
A Kind of a cream color.
Q What do you mean by cream? Was it towards white or yellow?
A Closer to white.
Q Was it a bright car or sort of a dirtyish kind of car?
A It wasn't a bright car.
Q Who was in that car?
A There were two gentlemen, one in the front and one in the back.
[fol. 225] Q When you say at the present moment, what do you mean by he present moment?
A Well, one of them left.
Q When did you first observe that car?
A He was backed up to my husband's car and he got out and left and they moved.
Q Was that prior to the time you observed the two men you testified to, before?
A That is right.
Q And how much prior to that time?
A Well, we was there about ten minutes, and when we got to the bank, he went in and then we found out it was a bank robbery, because he was inside of the bank.
Q But you observed the Pontiac, as I understand it, about ten minutes prior to the time you went over to the bank?
A That is right.
Q Is that correct?
A Because he was still in the bank.
Q I didn't quite understand your testimony about those two men you saw in the car. Who were those two men?

A (Nodding.)

Q Do you know who those two men were?

[fol. 226] A No, I don't.

Q You mentioned on cross examination that you made an identification in person of one of the gentlemen you observed, is that right?

A That is right.

Q Do you recall when that was?

A No, I don't.

Q Do you have any recollection as to when after the robbery, was it three months, eight months, six months?

A No, it has been later than that.

Q Tell us where tht personal identification took place?

A I saw him in the corridor.

Q A corridor?

A Yes.

Q And where was that?

A I don't recall where it was.

Q You don't recall what kind of building it was?

A (Nodding.)

Q Do you recall whether there were any police officers or Federal Bureau of Investigation people present at that time?

A Yes, there was.

MR. STANFORD: Your Honor, may we approach the Bench?

[fol. 227] THE COURT: Yes.

AT THE BENCH:

MR. STANFORD: I am afraid that this line of questioning Mr. Sepenuk is pursuing might bring out the fact that it was in the Courthouse, and the Jury could conclude at this point that he was being subjected to other prosecution. I feel that since we have not yet made a decision whether he will appear on the stand, he may not yet determine any of his record which would be brought out. All the Court did was review that yesterday, and this should not be pursued with regard to the nature of the location.

THE COURT: I think it has already been brought out that there was an in-person identification five months after the incident.

MR. STANFORD: That is correct. I did not identify the location and that is the area which I wanted to object to.

THE COURT: Then I think Mr. Rosen brought out, and this is the reason for counsel pursuing it. Mr. Rosen brought out the fact the witness has not seen these two men since that day, so there is an ambiguity in the testimony. I think counsel is entitled to explore it, but she said in the Courthouse.

MR. STANFORD: She said the corridor.

[fol. 228] MR. SEPENUK: She said the corridor, she didn't remember where, but I hoped—what I hoped to do is put the police officer on to tell exactly what she did do. I think they did bring out on cross examination when she previously did that, it was not in connection with an in-custody identification, it was simply one of a bystander in the hallway.

MR. STANFORD: I think we should keep it as an unidentified location.

THE COURT: All right. But the fact is most of the people who go to the Court of General Sessions are traffic violators. I think everybody knows that.

MR. ROSEN: There are more drunks.

THE COURT: I didn't think there were more drunks than drivers.

MR. STANFORD: Your Honor may well be right, that may well be true. In view of the fact he has been charged with a very serious felony, I would feel they might think he was there on another serious matter.

MR. SEPENUK: I think it can be brought out by the prosecution properly why he was there.

THE COURT: I think he has a right to clarify this matter that you brought out.

[fol. 229] MR. ROSEN: I have answered—

THE COURT: Since that day, she has not seen these two men prior to the day of the robbery.

MR. ROSEN: I have an objection that if Mr. Sepenuk is going to do this. The mere fact that she saw him in the corridor without saying it was in the Courthouse leaves the implication that he was one of the criminals.

MR. SEPENUK: I would like to say, I don't want to anticipate considering the state of mind of this woman. I will anticipate that she will probably not be able to identify Mr. Bailey as the person she picked out. If I have to, I will call Agent Markowvich to establish the fact.

MR. ROSEN: I don't think you should get the Courthouse in. Why don't you establish it with him without her.

MR. SEPENUK: I think he is clearly the person to, if he is able to do so.

THE COURT: I will let him ask the question.

IN OPEN COURT:

BY MR. SEPENUK:

Q Again, Mrs. Apple, going back to that personal identification in the corridor of a building, do you recall whether any police officers or federal agents were present at that time?

[fol. 230] A Yes, there was.

Q Who was present to the best of your recollection? Do you know their names?

A No, I don't.

Q Have you seen any of them today?

A No, I don't think so.

MR. SEPENUK: I think that is all.

By the way, I would like to ask just one other question.

BY MR. SEPENUK:

Q Do you remember the person you identified at that time? Did you identify a person at that time as one or more persons as being one of the gentlemen that robbed that bank?

A Yes, I identified one of the persons.

Q Do you recall which person that was?

A Yes, I think I do.

Q Who was it?

A John Lee Bailey.

MR. SEPENUK: Thank you.

THE COURT: Any further questions?

MR. SEPENUK: I am sorry, may I ask just one or two more questions?

[fol. 231] THE COURT: Yes.

BY MR. SEPENUK:

Q What were the circumstances of that application, do you recall how you figured out Mr. Bailey? Tell us what you did?

A I just walked into the corridor and they told me to look around, and I looked around.

Q And how many people approximately were in the corridor at that time?

A The corridor was full.

Q And what did you do after—what did the officers say to you, the officers said what to you?

A They just told me to look around and see if I could identify a fellow in the room, in the corridor.

MR. ROSEN: Objection. It is clearly hearsay.

MR. SEPENUK: I am not introducing it as to a truth, I am just giving some background.

THE COURT: I think with that limiation, I will overrule the objection.

BY MR. SEPENUK:

Q Was any suggestion made to you by—

MR. ROSEN: Objection.

[fol. 232] MR. STANFORD: Leading.

BY MR. SEPENUK:

Q All right.

MR. SEPENUK: Now, if you are objecting to hearsay—

THE COURT: Counsel come to the bench, please.

AT THE BENCH:

THE COURT: I assume you are seeking to show that there was no suggestion made.

MR. SEPENUK: Exactly, yes.

MR. ROSEN: That was a matter of law decided before trial.

THE COURT: I think we have been into that.
MR. SEPENUK: I will drop it.
MR. ROSEN: That was a matter the witness testified to.
MR. SEPENUK: That is all I have.
THE COURT: All right.

IN OPEN COURT:

THE COURT: You may proceed.

RECROSS EXAMINATION

BY MR. STANFORD:

Q Mrs. Apple, to recapitulate on identification, when you first identified this man in the corridor as you stated to us, were you told at that time or at any time prior that he was John Lee Bailey?
[fol. 233] A No, I wasn't.
Q I see. Did you see his photograph anytime within the week?
A No.
Q Two weeks prior to that?
A No, I didn't.
Q You never seen his photograph before?
A No, I didn't.
MR. STANFORD: Nothing further.

RECROSS EXAMINATION

BY MR. ROSEN:

Q Just one question. Mrs. Apple, at that time, since then, you told us of the incident, you did not see the other person involved, is that so?
A That is right.
MR. ROSEN: Nothing further.
MR. SEPENUK: That is all we have.
THE COURT: All right. May the witness be excused?
MR. ROSEN: No objection.

MR. STANFORD: No objection.

THE COURT: Thank you. You may be finally excused.

(The witness was excused.)

* * * *

[fol. 316] MR. STANFORD: The Government rests at this time?

MR. SEPENUK: Yes.

THE COURT: All right.

MR. ROSEN: At this juncture, while we are here, we make a motion for a direct verdict.

THE COURT: You might as well.

MR. ROSEN: I would make it on the grounds of [fol. 317] lack of complete identity. The first element of the offense is robbery and various robberies with all the various counts are, in fact, concerned—

THE COURT: I think that is an issue for the Jury.

MR. ROSEN: Your Honor, if we say that the issue of identification must be proved by the Government beyond a reasonable doubt, I would submit to the Court that the Government has not yet met that burden on your identification.

THE COURT: As I read Curley & Crawford, the issue whether the Jury could on the evidence presented to find beyond a reasonable doubt. It is an issue for the Jury, then it goes to the Jury. I think this is an issue for the Jury.

MR. ROSEN: All right.

* * * *

[fol. 318] Now, for the record, do you wish to join in for a motion for a direct verdict?

MR. STANFORD: I do for the reasons that I previously urged.

THE COURT: I will look at the Kelley case.

MR. STANFORD: Yes, Your Honor.

THE COURT: As to whether or not the Court will strike the answer of the witness.

MR. STANFORD: I will endeavor to find some additional material.

THE COURT: All right.

(Whereupon, at 5:35 p.m., the above-entitled cause adjourned till Friday, May 10, at 11:00 o'clock a.m.)

* * * *

[fol. 323] MR. ROSEN: While I am here, I renew two matters, I would like to renew also the motion as to Mr. Stanford with respect to a speedy trial. I don't know if the Court has ruled as yet. You said you would take it under advisement.

THE COURT: I think that I had a review of the delays in the case, and I have the facts which have been [fol. 324] mostly attributed to Defendant Ash. So far as his two mental examinations at St. Elizabeths are concerned, and the several motions that he filed for a speedy trial which had the effect of delaying the case, and when those circumstances are taken into consideration, it appears certainly as to him the motion should be denied. With respect to Defendant Bailey, Bailey did not go to St. Elizabeths and he, I think, filed only two motions for a speedy trial.

MR. STANFORD: That is correct.

THE COURT: Frankly, I have a question on that motion so far as he is concerned, and one of the reasons I reserve as to him.

* * * *

[fol. 361]

DIRECT EXAMINATION

BY MR. STANFORD:

Q Agent Markovich, you interviewed a woman by the name of Mrs. Betty Apple, did you not?

[fol. 362] A Yes, sir.

Q On February 3rd, 1968, did you not show her various photographs?

A Yes, sir.

Q At that time, with regard to one photograph which was of John Bailey, Defendant John Bailey, did she say that she could not be sure that this was one of the men, but thought it might be?

A Yes, sir.

Q Were those her terms or could you tell us?

A She said it could be, as I recall.

Q Now, prior to that time were you aware of the fact that a Sergeant from the Metropolitan Police Department had shown her the same photographs?

A Not to my knowledge, no, sir.

Q Have you had any conversation with Sergeant Wheland Fallin who is present today and has been present in the witness room throughout the trial, to learn from him whether or not he had shown a photograph of John Bailey to Mrs. Apple at any time prior to your showing her the photograph on February 3rd?

A No, sir.

Q Agent Markovich, did you accompany Special [fol. 363] Agent Berry of the FBI when he showed photographs to Mrs. Apple early this week?

A No, sir, I did not.

* * * *

[fol. 365] Q Did there come a time thereafter, Agent Markovich, when you and Sergeant Lynn and Sergeant Fallin, both of the Metropolitan Police Department, accompanied Mrs. Apple to a location to look at the Defendant John Bailey?

A Yes, sir.

Q Did you initiate that appointment with Mrs. Apple?

[fol. 366] A I can't say for certain if I did or if it was done by the Robbery Squad.

Q Where did you and the two officers of the Metropolitan Police Department meet with Mrs. Apple?

A I believe we picked her up probably at her residence or at work, I am not certain.

Q Were the three of you together at that time?

A I believe the members of the Robbery Squad went down in their own car, and I had a car.

Q You met the three—the three of you met or the three, two police officers and yourself, and Mrs. Apple met at this location?

A Yes, sir.

Q Do you recall what you said to Mrs. Apple prior to her going to this location or what the officer said to her as to the purpose of her going into this location?

A I told her that we were going down to the location—

Q This was a public building?

A Yes, sir. She was to walk through the corridor and observe the people there and see if she could pick out anyone that she had seen near the American Securities & Trust Company on August 26, 1665.

[fol. 367] Q So this was on what date?

A I believe it was February 18.

Q Therefore, it was subsequent by 15 days to the time when you showed her a picture of John Bailey, the Defendant here?

A Yes, sir.

Q And to which she responded it could be the man?

A That is right.

Q And to reitertae, you do not know whether or she had been shown a picture of John Bailey at any time prior to February 3rd, when you first showed her the photographs of John Bailey or any time subsequent to February 3rd and prior to February 18, when she was in the corridor where John Bailey was present?

A That is correct.

MR. STANFORD: I have nothing further.

THE COURT: Mr. Sepenuk?

MR. SEPENUK: Yes, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. SEPENUK:

Q On February 3rd, when you showed Mrs. Apple the [fol. 368] photographs, Agent Markovich, did Mrs. Apple make any comment as to whether or not she could be more sure of the identification if she saw Mr. Bailey?

A She said she thought she could be more positive if she saw him in person.

Q On February 18, the location you mentioned, how many were in the corridor at that time?

A I have to say a minimum of 50.

Q And who was the person pointed out by Mrs. Apple as the man in the vicinity of the American Securities & Trust Company, East Capitol Street Branch, on August 26, 1965?

A John Lee Bailey.

MR. SEPENUK: Thank you.

THE COURT: Is there anything further, gentlemen?

MR. ROSEN: No, Your Honor.

MR. STANFORD: Nothing.

THE COURT: You may step down.

(The witness was excused.)

MR. ROSEN: May we approach the Bench?

THE COURT: Yes, sir.

AT THE BENCH:

MR. ROSEN: Your Honor, at this juncture, I have [fol. 369] nothing further to put on to verify this note. I would like to reserve the right to put additional testimony on if I think it is necessary. My defendant, I will not put on, and I want it on the record.

THE COURT: All right.

MR. ROSEN: Finally, you may get a chance. I defer to Mr. Stanford.

THE COURT: All right.

MR. STANFORD: I would like to call Sergeant Fallin.

IN OPEN COURT:

MR. STANFORD: Sergeant Fallin, please.

Whereupon,

WHELAND H. FALLIN

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STANFORD:

Q Sergeant Fallin, you are Sergeant Wheland Fallin of the Capitol Police Department?

A No, the Metropolitan Police Department, detailed to the Capitol.

Q I see. I think you have previously stated to us you have been assigned to this case, Bailey, John Bailey?

[fol. 370] A Yes, I was.

Q In the course of your investigation, did you have an opportunity to speak with Mrs. Betty Apple?

A Yes, I did.

Q Did you show her photographs, specifically a photograph of Defendant John Bailey, on January 28rd, 1966?

A Yes, I did.

Q Do you know whether this was the first time she had seen it, the photograph of John Bailey?

A To my knowledge, yes.

Q Was she shown any photographs by you or by your partner, Sergeant Lynn, at any time subsequent to that date?

A Not to my knowledge.

Q Are you aware of the fact that Agent Patrick Markovich showed her a photograph of John Bailey on February 3rd?

A No, I am not.

Q Then did you accompany Mrs. Apple to a public building on February 18, with Sergeant Lynn and Agent Markovich?

A To the best of my knowledge, I met them at the building.

Q At that time was John Bailey present?

A No, he was not. To my knowledge, he wasn't, I didn't see him.

[fol. 371] Q You did not see him?

A At that time.

Q Did you subsequently see him?

A Yes, I did.

Q This was subsequent to the time you showed the photograph of John Bailey to Mrs. Apple?

A That is correct.

Q What did you say to Mrs. Apple prior to her coming into the building as to the purpose for her going there?

A On the date, I said nothing to her, I didn't meet her until we were in the building.

Q You didn't say or give the purpose?

A No.

Q Did Sergeant Lynn?

A I don't know.

Q Were you accompanying Sergeant Lynn?

A I don't think so, I think I met them at the building.

Q Did Sergeant Lynn pick Mrs. Apple up from her residence?

A I do not know, I can't remember.

MR. STANFORD: I have nothing further.

Mr. Sepenuk?

[fol. 372]

CROSS EXAMINATION

BY MR. SEPENUK:

Q Sergeant Fallin, did you observe Mrs. Apple make the identification of Mr. Bailey in the corridor of this building?

A Yes, I did.

Q Tell us what she did?

A She pointed out to Sergeant Lynn the subject who I identified as John Lee Bailey as the man. She was—she said that was one of the two subjects that ran from the bank at the 800 block of East Capitol Street on the date in question. She pointed him out, he was the one lighting the cigarette.

Q How many people were in the corridor at that time to the best of your recollection?

A To the best of my recollection, I would approximate it at 50.

MR. SEPENUK: Thank you.

* * * *

[fol. 373] THE COURT: I have one observation, gentlemen, with respect to the testimony of Sergeant Fallin. As I recall, your questioning was to the effect did you on the 23rd of January show a photograph to Bailey to Mrs. Apple. Now, my recollection of the prior testi-

mony out of the presence of the Jury was that on that occasion he showed her several photographs, it was not a single photograph. I don't want to ask questions if I don't have to, so I wish if either of you would clear that point up so they will have the facts, whatever the fact is.

[fol. 374] MR. SEPENUK: I should have clarified it. I will be happy to do so.

MR. ROSEN: All right.

IN OPEN COURT:

BY MR. SEPENUK:

Q Sergeant Fallin, you stated on January 23, 1966, you showed a photograph of John Bailey to Mrs. Apple, is that correct, sir?

A That is correct.

Q Was that the only photograph or were there others?

A There were others.

Q How many others were there?

A Four.

Q Thank you very much.

* * * *

[fol. 410] MR. STANFORD: Our next witness, I would like to call Special Agent Berry of the FBI.

Whereupon,

HUGH GORDON BERRY

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STANFORD:

Q Would you give the Court and the Jury your full name?

A Hugh Gordon Berry.

Q What is your occupation?

A Special Agent for the Federal Bureau of Investigations.

Q How long have you been so employed?
A Seventeen years.
Q Mr. Berry, did you have any connection with this case? Did you have occasion to speak with Mrs. William Apple?
A Yes, I did.
Q Also known as Betty Apple?
A Betty Apple.
Q And where was that?
[fol. 411] A That was at the Savarin Restaurant in the Union Station.
Q Did you at that time show her several photographs, photographs in color?
A Yes, I did.
Q Did she identify one of those five photographs as the man who was engaged in the holdup of the American Securities & Trust Company in August 26, 1965?
A Yes, she selected one, she thought he was the one.
Q I see. I show you what has been marked as Defendant's Exhibit No. 5 for identification. Is this the man that she identified as the one person of those five whom she believed was engaged in the robbery?
A That is correct.
Q I show you Defendant's Exhibit No. 4 for identification, did she make any identification of that, that is, Exhibit No. 4 with regard to the connection with this robbery?
A No, she did not.
Q Can you tell us whose photographs that is, Exhibit No. 4, who Mrs. Apple did not identify as one of the persons involved in the robbery?
A This is John Lee Bailey.
[fol. 412] MR. STANFORD: Your Honor, I would ask that this be entered into evidence and shown to the Jury.
MR. ROSEN: No objection.
THE COURT: Does counsel wish to be heard?
MR. SEPENUK: Is the other one in evidence, though?
MR. STANFORD: No, none of these five.
MR. SEPENUK: I believe that should go into evidence, too.
MR. ROSEN: I will object to that, Your Honor.

THE COURT: Counsel may come to the Bench.

AT THE BENCH:

MR. SEPENUK: As a matter of fact, I think they should all go into evidence.

MR. STANFORD: Your Honor, I have no objection to that at all. Mr. Rosen, of course, does. I did not specifically wish to put Mr. Bailey's picture to the Jury.

MR. SEPENUK: Aren't the other five the black and white?

MR. ROSEN: They are marked for identification.

THE COURT: What does the record reflect with reference to the pictures?

THE DEPUTY CLERK: The five were marked as [fol. 413] Government's Exhibits in the hearing, and they have been remarked as Defendant Bailey's Exhibits for the trial.

THE COURT: But they have not been—

MR. STANFORD: No, Your Honor.

THE COURT: —attempted to be put in?

MR. STANFORD: I did attempt to admit them into evidence, and the Court admonished me.

THE COURT: Yes, sir.

MR. SEPENUK: Excuse me. Has he orally stated he identified Ash that came out just now?

MR. STANFORD: Yes.

MR. SEPENUK: May I have that. If the two come in, I think they all should come in.

MR. ROSEN: I would object to Mr. Ash's picture. I don't want to see Mr. Stanford getting bad marks for my client.

MR. STANFORD: I have no intention of doing that. I feel if it clarifies more rapidly, shows the fact that John Lee Bailey's picture was seen by the witness and not identified, I think it might help. Could I take another look at them?

I withdraw the motion at this time since I almost hate to withdraw them.

MR. ROSEN: If the testimony—let me make a [fol. 414] prof- fer, if the testimony is that she denies identifying Bailey, isn't that without prejudice to Ash?

MR. STANFORD: All right, I will withdraw that, then.

MR. SEPENUK: Except she orally identified Ash.

MR. ROSEN: I have no objection to that, but you want Mr. Stanford to be the second crew for Mr. Ash.

MR. STANFORD: I don't have any intention of doing that. I withdraw that.

THE COURT: All right.

IN OPEN COURT:

MR. STANFORD: Your Honor, in view of the statement at the Bench, I will not ask specifically that the picture of John Bailey be shown to the Jury, but I would like to, without really being repetitious, to have it entirely clear in the minds of the Court and the Jury. The picture of John Bailey was shown to Mrs. Apple, but she did not identify that picture as being a man who was involved in the robbery.

THE WITNESS: That is correct.

BY MR. STANFORD:

Q And what date was that?

A Well, the robbery was several years ago.

Q The date that you showed her this photograph?

[fol. 415] A That was Tuesday. I am not sure what day it was.

Q It was some day earlier this week?

A That is correct.

Q Now, Mr. Berry, did you at any time show any other photographs to Mrs. Apple?

A No, I did not.

Q So you have no personal knowledge whether anyone else showed her pictures or how many times pictures were shown to her?

A No personal knowledge.

MR. STANFORD: I have nothing further.

MR. SEPENUK: May I have those for one moment? May we approach the Bench again, Your Honor?

THE COURT: Yes, sir.

AT THE BENCH:

MR. SEPENUK: I was thinking out loud on this now, I don't know if we want that picture to go into evidence. You know, this is a very good likeness of him. I think he looks far different today than he did.

MR. ROSEN: It is not going into evidence.

MR. SEPENUK: I think perhaps it should to bring it out completely. I think it should go in. In other words, I think by—

[fol. 416] MR. STANFORD: We have the issue as to whether or not he did look the same as he did look at the time. I think he does not.

THE COURT: Gentlemen, cut this down to the bone. Either side or either counsel may offer it in evidence, and Mr. Stanford has decided to offer it. Is that correct?

MR. STANFORD: Yes, I have so decided.

THE COURT: Do you now wish to offer it?

MR. SEPENUK: Yes, I think I will offer that.

THE COURT: All right.

MR. SEPENUK: I would like to—

MR. ROSEN: I would oppose it. My recollection is that she testified it looks like him, but she wasn't certain. I believe that was brought out in the hearing yesterday out of the presence of the Jury.

MR. SEPENUK: That has been opened by defense counsel, Your Honor.

THE COURT: I would be disposed to admit it regardless of who offers it. It has been the subject of testimony, and I think under the circumstances, the defense says they prefer the status in not getting into this thing. I don't like to go into it, as I told you. Once it has been [fol. 417] opened up, I think the Jury is entitled to make for what ever reaction it maybe produced. I just don't know. Should we introduce all five?

MR. ROSEN: That might avoid prejudice against Ash.

MR. SEPENUK: I can offer these photographs, and make a separate introduction, and that is the end.

MR. STANFORD: If that is the case, I would ask that I do that.

THE COURT: All right. Gentlemen, it doesn't make any difference.

MR. STANFORD: If you oppose it—I have been trying to—

THE COURT: All right.

MR. STANFORD: I don't wish to undercut Mr. Sepenuk.

MR. SEPENUK: It is all right.

THE COURT: Do you agree to all five?

MR. SEPENUK: Why don't we stipulate that all—can we stipulate that all five can go in?

MR. STANFORD: Why can't we do that?

THE COURT: All right.

IN OPEN COURT:

MR. SEPENUK: Your Honor, it has been stipulated [fol. 418] that Defendant's Exhibits 1 through 5 are in fact the five photographs shown by Agent Berry to Mrs. Apple, and it is further stipulated they may be introduced into evidence.

MR. STANFORD: That is so stipulated.

MR. ROSEN: So stipulated.

THE COURT: They may be received in evidence.

(Defendant Bailey's Exhibits Nos. 1 through 5 were received in evidence.)

THE COURT: Ladies and gentlemen, as I previously said about a stipulation, it is an agreed statement of fact, and you may accept it as undisputed evidence in the case.

MR. SEPENUK: I have no questions, Your Honor.

MR. ROSEN: I have nothing further.

MR. STANFORD: Your Honor, that is the case of John Bailey.

THE COURT: Thank you, you may be excused finally.

(The witness was excused.)

THE COURT: Anything further, Mr. Rosen?

MR. ROSEN: No, Your Honor, the Defendant Ash rests.

THE COURT: Does the Government have any rebuttal?

MR. SEPENUK: No, Your Honor.

THE COURT: Counsel come to the Bench, please.

[fol. 419] AT THE BENCH:

MR. ROSEN: For the record, I renew my motion for a judgment of acquittal.

MR. STANFORD: I so renew my motion.

THE COURT: The Court's ruling will be as previously announced to you, the motion for judgment of acquittal so far as Ash is concerned is denied. The Court will reserve as far as Bailey is concerned. All right.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 71-1255

UNITED STATES, PETITIONER

v.

CHARLES J. ASH, JR.

ORDER ALLOWING CERTIORARI—Filed June 12, 1972

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1972 471032 23